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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 448

AARON PRUSSIAN, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 11, 1930

CERTIORARI GRANTED OCTOBER 20, 1930

(35,370)

(35,370)

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IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff,

against

AARON PRUSSIAN, Defendant

STATEMENT UNDER RULE 13

This is an appeal by the defendant, Aaron Prussian, from a judgment of conviction in a case tried before the Honorable John E. Martineau, United States District Judge, sitting in and for the Eastern District of New York, and a jury.

The indictment herein was filed on the 26th day of February, 1929, and contained two counts. After pleading not guilty on the 11th day of March, 1929, defendant was released upon furnishing bail fixed by the Court at $3500. The first count of the indictment charged the defendant with falsely making, forging and altering a certain obligation of the United States, to wit: the endorsement on a draft for the payment of money for the purpose of obtaining and receiving from the Treasurer of the United States a sum of money, to wit: Nine thousand forty-four and 37/100 ($9,044.37) Dollars. The second count charged the defendant with the unlawful uttering of the said certain obligation.

[fol. 2] On the 6th day of August, 1929, the second count of the indictment was dismissed by the Court at the close of the entire case. The jury rendered a verdict of guilty on the first count. On the 7th day of August, 1929, the Court sentenced the defendant to pay a fine of $200 and stand committed and be imprisoned for five years at the Federal Penitentiary at Atlanta, Georgia. Notice of appeal and the order allowing the appeal were signed and entered on the 8th day of August, 1929. There has been no change of attorneys since this appeal was taken.

IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL

SIRS: Please take notice that the defendant, Aaron Prussian hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the judgment of conviction rendered against him on the 7th day of August, 1928, convicting him of falsely making, forging and altering a certain obligation of the United States, to wit: the [fol. 3] endorsement on a draft for payment of money for the purpose of obtaining and receiving from the Treasurer of the United States a sum of money, to wit: Nine thousand Forty-four and 37/100 ($9,044.37) Dollars.

Upon conviction of the foregoing the defendant was sentenced to Five years in Atlanta Penitentiary and to pay a fine of Two hundred dollars.

Defendant hereby appeals from the said judgment and conviction; from the order denying defendant's motion to set aside the verdict and for a new trial, and denying arrest of judgment and from each and every part of said judgment.

Dated August 8th, 1929.

Yours, &c., Harold L. Turk, Attorney for Defendant. Office & P. O. address: 26 Court Street, Borough of Brooklyn, City of New York.

To Howard W. Ameli, United States Attorney, Post Office Building, Brooklyn, New York; Percy G. B. Gilkes, Clerk of the U. S. District Court, Eastern District of New York.

The within appeal is hereby allowed.

Dated August 8th, 1929.

John E. Martineou, U. S. D. J.

[fol. 4] Citation, in usual form, omitted in printing.

[fol. 5] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

And now comes Aaron Prussian, the defendant above-named, by Harold L. Turk, his attorney, and makes the following assignment of errors which he avers occurred upon the trial of this action:

First. The Court erred in denying defendant's motion to dismiss the indictment against the defendant upon the ground that the same did not state a crime under the laws of the United States.

Second. The Court erred in overruling the defendant's demurrer to the indictment on the ground that the said indictment did not state a crime under the laws of the United States.

Third. The Court erred in denying defendant's motion made at the close of the Government's case to dismiss the indictment and discharge the defendant.

[fol. 6] Fourth. The Court erred in denying defendant's motion for the direction of a verdict of not guilty at the close of the entire case.

Fifth. The Court erred in denying the motion of the defendant to set aside the verdict of the jury and for a new trial.

Sixth. The Court erred in denying defendant's motion for an arrest of judgment.

Seventh. The Court erred in entering judgment and imposing sentence upon the verdict of guilty.

Eighth. The Court erred in overruling the defendant's objection to the admission in evidence of Government's Exhibit 3.

Ninth. The Court erred in denying defendant's request to charge that if the jury believed the testimony of the witness, Miller, to the effect that the power of attorney admitted in evidence as Government's Exhibit 3 did not in any way limit the power of attorney admitted in evidence

as Government's Exhibit 1 that they should find a verdict of not guilty.

Wherefore the defendant, Aaron Prussian prays that the aforesaid judgment may be reversed and that he have such other and further relief as may be just and proper in the premises.

Harold L. Turk, Attorney for Defendant. Office & P. O. address: 26 Court Street, Borough of Brooklyn, City of New York.

[fol. 7] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER STAYING EXECUTION—Aug. 8, 1929

The above-named defendant, Aaron Prussian, in the above-entitled action, having duly served and filed a notice of appeal from a judgment of conviction, and the citation having been duly issued thereon, it is

Ordered that the defendant, Aaron Prussian be set at liberty by furnishing a security bond in the sum of Ten Thousand ($10,000) Dollars during the pendency of said appeal in said Circuit Court of Appeals in the Second Circuit and until the mandate of said Circuit Court of Appeals be issued on said appeal and an order of this Court entered thereon, and in the meantime all proceedings for the execution of the sentence be in all respects stayed, and [fol. 8] the execution of said sentence is hereby stayed until the final determination of the appeal herein by the Circuit Court of Appeals; and it is further

Ordered that the Warden or keeper of any penal institution in which the defendant herein, Aaron Prussian may be confined shall forthwith discharge the said defendant, Aaron Prussian from custody on the filing with him a copy of this order with proper evidence showing that the required bail has been duly given.

John. E. Martineau, U. S. D. J.

[fol. 9] IN UNITED STATES DISTRICT COURT

INDICTMENT.

LRH/LG

At a Stated Term of the District Court of the United States of America for the Eastern District of New York, begun and held in the Borough of Brooklyn, City of New York, within and for the District aforesaid, on the 7th day of February in the year of our Lord one thousand nine hundred and twenty-nine, and continued by adjournment to and including the 26th day of February in the year of our Lord one thousand nine hundred and twenty-nine.

EASTERN DISTRICT OF NEW YORK, ss:

The Grand Jurors of the United States of America, within and for the district aforesaid, on their oaths present that Aaron Prussian, hereinafter called the defendant, on or about the 6th day of April 1926, in the Borough of Brooklyn, County of Kings, City, State and Eastern District of New York and within the jurisdiction of this Court, did then and there unlawfully, wilfully, knowingly and feloniously, falsely make, forge and alter a certain obligation of the United States, to wit: the endorsement on a draft for payment of money, for the purpose of obtaining [fol. 10] and receiving from the Treasurer of the United States, a sum of money, to wit: Nine thousand forty-four dollars and thirty-seven cents ($9,044.37), in the following manner, that is to say: that theretofore a certain draft for the payment of money, to wit: the sum of Nine thousand and forty-four dollars and thirty seven cents ($9,044.37), was drawn by an authorized officer of the United States, to wit: by one J. L. Summer, Disbursing Clerk of the United States Treasury, upon the Treasurer of the United States, to the order of Malcolm S. Mackay, Admr. Est. of Jennie E. Mackay, which said draft was an obligation of the United States and was in the words and figures following:

"Treasury, Washington, D. C. 784427

Mar. 19, 1926.

Treasurer of the United States

15-51

[SEAL.]

Pay to the Order of Malcolm S. Mackay, admr. est. of Jennie E. Mackay, $9,044.37, nine thousand forty-four 37/100 dollars.

Object for which drawn: Refunding taxes illegally collected.

N. P. 1-387. 14342."

J. L. Summer, Disbursing Clerk.

[fol. 11] and on the back of which said draft for money, were the words and figures following, to wit:

"Form approved by Comptroller of the Treasury January 27, 1913. This check must be indorsed in ink or indelible pencil on the line blow by the person in whose favor it is drawn and the name must be spelled exactly the same as it is on the face of the check. If endorsement is made by mark (X) it must be witnessed by two persons who write, giving their place of residence in full. (Signed) (Sign on this line) Malcolm S. Mackay, Admr. Est. of Jennie E. Mackay. Aaron Prussian, Atty. Aaron Prussian. Pay to the order of Bank of Coney Island. J. L. Buckman."

that the said draft for money was duly issued to the said, Malcolm S. Mackay, Admr. Est. of Jennie E. Mackay, and thereafter the defendant did unlawfully, wilfully, knowingly and feloniously obtain possession of said draft for money and did then and there falsely forge the endorsement of the said draft by falsely making and forging the [fol. 12] name of the payee, to wit: the words "Malcolm S. Mackay" on the back of said draft for money; that the said draft for money with the said forged endorsement thereon did together constitute a forged obligation of the United States as the defendant then and there well knew, with intent then and there and thereby to defraud, in violation of Title 18, United States Code, Sections 73 and 262; (Sec-

tions 29 and 148 U. S. C. C.); against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided.

Second Count

And the Grand Jurors aforesaid on their oaths aforesaid do further present that Aaron Prussian, hereinafter called the defendant, on or about the 6th day of April 1926, in the Borough of Brooklyn, County of Kings, City, State and Eastern District of New York and within the jurisdiction of this Court, did then and there unlawfully, wilfully, knowingly and feloniously pass, utter and publish to and upon one J. L. Buckman, a certain forged obligation of the United States, to wit: a draft for the payment of money which was drawn by an authorized officer of the United States, to wit: by one J. L. Summer, Disbursing Clerk of the United States Treasury, upon the Treasurer of the United States, to the order of Malcolm S. Mackay, Admr. Est. of Jennie E. Mackay, which said draft was an obli- [fol. 13] gation of the United States and was in the words and figures following:

"Treasury, Washington, D. C. 784427

Mar. 19, 1926.

Treasurer of the United States
15-51

[SEAL.]

Pay to the Order of Malcolm S. Mackay, admr. est. of Jennie E. Mackay, $9,044.37, nine thousand forty-four 37/100 dollars.

Object for which drawn: Refunding taxes illegally collected.

N.P. 1-387. 14342."

J. L. Summer, Disbursing Clerk.

and on the back of which said draft for money, were the words and figures following, to wit:

"Form approved by Comptroller of the Treasury January 27, 1913. This check must be endorsed in ink or indelible pencil on the line below by the person in whose favor it [fol. 14] is drawn and the name must be spelled exactly the

same as it is on the face of the check. If endorsement is made by mark (X) it must be witnessed by two persons who can write, giving their place of residence in full. (Signed) (Sign on this line) Malcolm S. Mackay, Admr. Est of Jennie E. Mackay. Aaron Prussian, Atty. Aaron Prussian. Pay to the order of Bank of Coney Island. J. L. Buckman."

he the said defendant, Aaron Prussian, did then and there well know the said endorsement, to wit: Malcolm S. Mackay, thereon, to be false and forged and with intent to utter the same as true and genuine and with intent then and there and thereby to defraud, against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided and especially contrary to Title 18, United States Code, Section 265.

William A. DeGroot, U. S. Attorney, Eastern District of New York.

[fol. 15] [Title omitted]

Title 18, United States Code, Sections 73, 262 and 265

Endorsements on Back of Indictment

Cr. 24140

1929.

Feb. 26th. Indictment filed.

March 4th. Bryant, J. Defendant not present; default noted; adjourned to March 18, 1929 for forfeiture.

March 11th. Campbell, J. Defendant arraigned. Plea not guilty with leave to withdraw same in 7 days to make such motions as may be required; Bail fixed at $3500. Ordered to return April 3, 1929.

April 3rd. Burrows, J.—Defendant present; ordered to return April 16, 1929.

13th. Notice of motion to dismiss indictment filed.

[fol. 16] 16th. Before Burrows, J.—Defendant present; ordered to return April 23rd 1929.

April 22nd. Before Burrows, J.—Hearing on motion to dismiss the motion argued—submit by April 24th 1929.

23rd. Burrows, J.—Def't present—Ordered to return May 8, 1929.

May 8th. Inch, J.—Def't present—Ordered to return May 27, 1929.

27th. Inch, J.—Def't not present—Case adjourned to June 10, 1929.

June 1st. By Burrows, J.—Order filed and entered denying motion to dismiss.

10th. Galson, J.—Def't not present—case adjourned to June 25th.

25th. Galston, J.—Def't not present—case adjourned to July 15th.

July 15th. Moscowitz, J.—Def't present; ordered to return July 29th.

29th. Moscowitz, J.—Def't present; ordered to return August 6th.

Aug. 6th. Before Martineau, J.—Def't present; trial ordered. Count 2 dismissed by Court. Jury rendered verdict of guilty. Def't remanded to Aug. 7th. 1929 for sentence.

7th. Before Martineau, J.—Def't present. Motion to set aside verdict denied. Def't sentenced to pay fine of $200. without costs and stand committed and to be imprisoned for 5 years on count 1 at Federal Penitentiary, At-

[fol. 17] lanta, Ga. without costs, on first count.

8th. Assignment of Errors and Citation filed.

8th. By Martineau, J.—Order filed and entered that def't be set at liberty during pendency of appeal on furnishing a surety bond for $10,000.

8th. Notice of appeal and allowance of appeal filed and entered.

8th. Bond for $10,000. filed.

Sept. 5th. By Inch, J.—Order filed and entered extending time to file Transcript of Record, etc., to October 15th 1929.

Oct. 11th. By Moscowitz, J.—Order filed and entered extending def'ts time to file Transcript of Record to Nov. 15, 1929, etc.

Nov. 14th. Campbell, J.—Order filed and entered extend- def'ts time to file transcript of Record to December 15th 1929.

Dec. 13th. By Byers, J.—Order filed and entered extending time of def't, Aaron Prussian, to file his transcript of record on appeal, etc. to January 15th 1930.

[fol. 18] In United States District Court, Eastern District of New York

The United States of America

vs.

Aaron Prussian

Bill of Exceptions

Before Hon. John E. Martineau, J., and a Jury

Brooklyn, N. Y., August 6, 1929.

Appearances of Counsel

Howard W. Ameli, Esq., United States Attorney, for the Government.

L. R. Henry, Esq., Assistant U. S. Attorney, of counsel.

Harold L. Turk, Esq., and William Berg, Esq., Attorneys for defendant.

A jury was examined, accepted and sworn.

The Court: You may state your case.

[fol. 19] Mr. Turk: May I ask that all witnesses except the witness testifying be excluded?

The Court: They may stay in court. I will let you cross-examine them if you wish.

Mr. Turk: Exception.

(Mr. Henry opened to the jury.)

(Mr. Turk opened to the jury.)

The Court: Call your witnesses.

John E. Miller, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Henry:

Q. What is your occupation?

A. Lawyer by profession, retired.

Q. Are you a member of the New York Bar?

A. A member of the New York Bar.

Q. How long have you been a member of the New York Bar?

A. I was admitted in 1874.

Q. That is over fifty years, and you have been a lawyer in New York?

A. Yes.

Q. Were you the lawyer for the Jennie E. Mackay Estate?

A. I was the attorney for Mrs. Mackay's estate.

Q. Do you know Clarence E. Mackay?

A. Malcolm S. Mackay.

Q. Malcolm S. Mackay I mean.

A. Yes.

Q. Was he the administrator to the will annexed of the Jennie Mackay Estate?

A. Yes.

Q. Did the Jennie E. Mackay Estate pay certain taxes to the United States Government after the estate was settled, or during the settlement of the estate?

[fol. 20] A. During the settlement of the estate, yes.

Q. Do you know how much they paid the Government?

A. In this particular case with principal and interest it amounted to about $9,000.

Q. You are not a tax lawyer as a specialty, are you?

A. No.

Q. You do not practice that specialty at all?

A. No.

Q. And in the course of your representing the Jennie E. Mackay Estate did you consider taking up the question of the refund by the United States Government of an overpayment of taxes or something like that?

A. I knew nothing of this matter of refund until it was brought to my attention.

Q. After it was brought to your attention did you negotiate with any particular firm of tax counsel?

A. Yes.

Q. Whom did you negotiate with?

A. Kay & Kay of Washington, attorneys, and Aaron Prussian, associated together, at New York.

Q. Did you talk with one of the firm of Kay & Kay, together with Aaron Prussian?

A. They called on me inquiring if I represented the Mackay Estate.

Q. When you say they, you mean who?

A. Aaron Prussian and Mr. Morris Kay of the firm of Kay & Kay.

Q. Will you please tell us when they called on you for the first time?

A. October 1924.

Q. And was that in your office in New York?

A. At my office at that time.

Q. Did you have any conversation at that time with the defendant, Mr. Prussian?

A. Yes, with Mr. Kay together.

[fol. 21] Q. And was Mr. Prussian there during all the conversation between Mr. Kay and yourself?

A. Yes.

Q. Just tell us what you said and what Mr. Prussian said as near as you can remember the conversation?

A. Morris Kay and Aaron Prussian called on me.

Mr. Turk: I am sorry to interrupt.

The Court: You will have to speak a little louder.

The Witness: Morris Kay and Aaron Prussian called on me at my office inquiring if I represented the Mackay Estate, and being informed in the affirmative, said that the Mackay Estate had a claim against the Government for overpayment of taxes. They introduced themselves by handing me their card, Aaron Prussian's card, and Morris Kay's card, stating that they were associated together. Mr. Kay gave me references, which I jotted down, on the card. I think the Forrest Brothers and the Wickersham firm were among them. I told them that I would have to inquire properly into the merit of the matter. They had three or four claims for refund of State taxes, inheritance taxes, in New Jersey, and this particular refund, and Government taxes. I was very busy. They told me their terms, which were perfectly satisfactory, and I was very busy, and I did not have time to look into it, and I told them that I

would look very carefully into it before employing them, [fol. 22] and if I found the claims were meritorious I would employ them. I looked into it, I received a letter from Kay & Kay with reference to the case and the merits of it, and also communications from Mr. Prussian. Later on I received a letter advising me that the time was running out, and that on the 15th of March the Statute of Limitations would run. I examined their references and found them satisfactory as to Kay & Kay, and informed him that he would be employed, and to bring around the papers.

Q. You did not investigate Mr. Prussian's references at all, did you?

A. I had no references given to me by Mr. Prussian. They were all by Mr. Kay.

Q. Just tell us what was the next step?

A. I insisted upon filing this claim that a letter should accompany it to the effect that if by any chance it had been allowed or credited by the Government previously, the claim should be disallowed and fall by itself. Mr. Prussian brought around the papers for execution and when he brought them to me there was a little claim, the method of computation of taxes in the estate of Duncan Mackay, deceased, a brother of Malcolm S. Mackay. The ruling of the Department had been changed after the taxes had been paid, and I told him, "You might just as well collect this at the same time." That first claim amounted to about $1700, merely a computation of interest, and the figures. The papers were executed, a power authorizing them to appear at the Internal Revenue Department, and likewise the office [fol. 23] of the Collector of Internal Revenue in New Jersey, which is absolutely necessary before you can get any refund. That was the customary thing.

Mr. Turk: I ask that the last part be stricken out as a conclusion on the part of the witness.

The Court: Strike it out.

Q. Go ahead. Please tell us what happened. You mentioned a power of attorney being given to Aaron Prussian.

A. He brought around the papers, the proof of claim, the power of attorney, and contract of employment.

Q. I show you this copy here, bearing the seal of the Treasury Department, and ask you if that is a copy of the

power of attorney which you mentioned in your testimony (hands paper to witness)?

A. Yes.

Q. And Mr. Mackay executed that, did he, if you know?

A. Yes.

Mr. Henry: I will offer this in evidence.

(The paper in question is received in evidence and marked Government Exhibit No. 1.)

Q. Did you see Mr. Prussian again after that time in reference to this claim?

A. Yes.

Q. About when was that, if you can remember, Mr. Miller?

A. It was a number of times, sometimes he would want additional papers, certificates, or ask for some information.

Q. Did you see him just before the claim was allowed or just after the claim was allowed?

A. Yes; not just before the claim was allowed. Some [fol. 24] time before the claim was allowed he wrote to me that the claim would be allowed, but there was no money paid.

Q. After that did you see him again?

A. Yes.

Q. In reference to getting the draft?

A. Not in reference to getting the draft, because I did not know that he ever had received the draft.

Q. Have you got that letter in which he said that the claim was allowed, that you received from him?

A. I don't think I have it. I have been looking for it very carefully and I could not find it, but I think I can find it if you give me the time.

Q. Is this the letter to which you refer (handing a letter to the witness)?

A. No; this is not the letter I referred to. It was a letter I received from him.

Q. That is another letter you received from him?

A. Yes.

Q. At any rate, did you prepare another power of attorney from Mr. Mackay to Prussian?

A. This letter I received requests an authorization—do you want his letter read?

The Court: Do you want that letter read, Mr. Henry?
Mr. Henry: Let me see it first.

Q. Did you prepare another power of attorney from Mr. Mackay to Aaron Prussian at any time after that?
A. Another power of attorney was given to Aaron Prussion authorizing him to receive——

Mr. Turk: I object to anything contained in it because it speaks for itself.

[fol. 25] Q. Did you prepare that?
A. No; I did not prepare it.
Q. Did you ever receive the refund from the United States Government?
A. No; not in the Jennie Mackay estate.
Q. Did the Jennie Mackay estate ever receive that refund from anybody?
A. No.
Q. You still have charge of the estate, have you not?
A. I retired from practice but I am still helping Mr. Mackay. The estate that I settled long ago.
Q. Did the estate ever receive that money from anybody?
A. No.
Q. I show you this draft here, and I ask you if you ever received that (hands a paper to witness)?
A. Oh, this is the check. No.

Mr. Henry: I will ask that that be marked for identification as Government Exhibit No. 2.

(The paper in question is marked Government Exhibit No. 2 for identification.)

Q. I show you this paper and ask you if you have seen that paper before, Mr. Miller (hands a paper to witness)?
A. Yes.
Q. Where did you first see it?
A. It was given to me by Mr. Prussian to have Mr. Mackay execute it.
Q. Did Mr. Mackay execute it? Do you know?
A. Yes.
Q. That is Mr. Mackay's signature at the bottom of it?
A. Yes.
Q. Then did you give it back to Mr. Prussian after that?
A. It was given to Mr. Prussian.

[fol. 26] Q. What is that?

A. And given by me to Mr. Prussian.

Q. You gave it back to him?

A. Yes.

Mr. Henry: I offer this paper in evidence as Government Exhibit No. 3.

(The paper in question is received in evidence and marked Government Exhibit No. 3.)

Mr. Turk: I object to the introduction of this power of attorney in evidence on the ground that it is signed by Malcolm E. Mackay, and not as Malcolm Mackay, not by Malcolm E. Mackay as administrator of the estate of Jennie E. Mackay.

The Court: The objection will be overruled. Do you want to read that, Mr. Henry?

Mr. Henry: I would like to read it in order to get the proof in chronological order.

(Mr. Henry reads Government Exhibit 3 to the jury and also Government Exhibit No. 1.)

Q. Referring to Government Exhibit No. 3, this second power of attorney, Mr. Miller, you said you delivered this to Mr. Prussian after Mr. Mackay had signed it?

A. Yes, after he executed it.

Q. But you did not draw the instrument yourself?

A. Mr. Prussian drew the instrument.

Mr. Henry: That is all.

[fol. 27] Cross-examination.

By Mr. Turk:

Q. Mr. Miller, the defendant Prussian was retained by the Mackay Estate by a written agreement, was he not?

A. An authorization, yes.

Q. I show you this paper and ask you whether this is a copy of the agreement retaining the defendant to act as attorney before the Tax Department (hands the witness a paper)?

A. Yes.

Mr. Turk: May I ask the Government to produce the original of that agreement?

Mr. Henry: What is the date of it?

Mr. Turk: The top is marked agreement. Will you let me have that please?

Q. Have you the original of that agreement in your possession?

A. No, because it had to be filed.

Q. I am speaking now of the original agreement and not the power of attorney.

A. No, because that was given to Mr. Prussian.

The Court: He admits that that is a copy of it.

Mr. Turk: I offer this in evidence.

(The paper in question is received in evidence and marked Defendant's Exhibit A.)

Q. Was this agreement signed by Mr. Mackay in your presence, that is, the retainer agreement?

A. Yes.

Q. And do you recall without refreshing your recollection by looking at this paper who Mr. Mackay retained under [fol. 28] this agreement, this written agreement to represent him before the Treasury Department?

A. Kay & Kay and Aaron Prussian.

Q. Are you sure of that?

A. The contract of employment was made with Kay & Kay and Aaron Prussian.

Q. I ask you whether you know without refreshing your recollection by looking at this paper here, this agreement, who Mr. Mackay retained to represent him before the Treasury Department?

A. The agreement designated Mr. Aaron Prussian to appear as attorney.

Q. That is all I asked you? Was there a written retainer agreement retaining this defendant Prussian to appear for the Mackay Estate, or to appear for Mr. Mackay in the Malcolm Mackay Estate?

A. There was an agreement with Mr. Prussian the same as this.

Q. That was by written agreement?

A. Written agreement.

Q. In the Duncan Mackay Estate Mr. Mackay agreed to give to Mr. Prussian a fee equal to 15 per cent of any amount recovered? Is that correct?

A. The agreement designated him. Yes.

Q. And at the same time that these retainers were given to Mr. Prussian Mr. Mackay executed the first power of attorney you referred to in your direct testimony?

A. Yes.

Q. I show you this paper marked agreement and ask you whether that is a retainer in the Duncan Mackay Estate (hands a paper to witness).

A. Yes.

Q. What is the percentage agreed upon in that agreement?

A. 15 per cent. unless——

[fol. 29] Mr. Turk: I offer that paper in evidence.

(The paper in question is received in evidence and marked Defendant's Exhibit B.)

Q. Mr. Miller, Mr. Prussian prepared these papers filing the claim for refunds in both of these estates, did he not?

A. The papers were brought to me by Mr. Prussian.

Q. Do you say now that you do not know who prepared those papers?

A. I would not say that.

Q. Do you remember testifying in this case once before?

(No answer.)

Q. Do you?

A. In New York here?

Q. Yes.

A. Yes.

Q. Do you remember testifying in New York that Mr. Prussian prepared all the papers?

A. He brought all the papers to me and I presume——

Q. You are not answering my question. I asked you whether you remembered testifying that Mr. Prussian prepared all of those papers?

A. I do not remember testifying to that but I assumed he did.

Q. Now, at the same time that you gave Mr. Prussian the power of attorney and the retainer in both of these estates you also gave him a letter addressed to the Treasury Department, did you not?

A. In the Jennie E. Mackay Estate.

Q. Pardon me.

A. In the Estate of Jennie E. Mackay.

Mr. Turk: Mr. Henry, will you let me see the minutes.

(Mr. Henry hands papers to Mr. Turk.)

[fol. 30] Q. Mr. Miller, Mr. Mackay received a check direct in the Duncan Mackay Estate, did he not?

A. Yes.

Q. Do you know whether Mr. Mackay ever sent the 15 per cent. of that check to Mr. Prussian-

A. No.

Q. When you say no you mean he did not send it?

A. He did not send it.

Q. As far as you know Mr. Prussian was not paid for his services in the Duncan Mackay Estate, was he?

A. Because——

Q. As far as you know?

A. Because he had collected——

Q. I am not asking you the reason. I am simply asking you as far as you know whether Mr. Prussian was paid for his services in the Duncan Mackay Estate?

A. No. That is perfectly true.

Q. Now, do you remember the circumstances concerning the second power of attorney to which you referred in your direct examination?

A. Yes.

Q. Now do you remember testifying with respect to that second power of attorney in New York before Judge Bondy?

A. I remember testifying before to that.

Q. Do you remember testifying, do you remember this question by Judge Bondy addressed to you "Did you give him Exhibit 2 (that is the second power of attorney) to limit Exhibit B (the first power of attorney)?"

A. I don't remember it.

Q. Do you remember your answer, "No, because the Government would not give him the check." In other words, do you remember your testimony in New York to [fol. 31] the effect that the second power of attorney was not intended to limit the first power of attorney? I am simply asking you whether you remember that testimony.

A. It had nothing to do with the first power of attorney. The second power of attorney was given to Mr. Prussian so that he could receive the check which they refused to give him at the Internal Revenue Office.

Mr. Turk: I ask that that answer be stricken out as not responsive to my question.

The Court: You can ask him now if he contradicts his former testimony, and you can direct him to that testimony.

Q. Will you say now that you do not recall that testimony before Judge Bondy?

A. I don't.

Q. Will you say now you did not so testify before Judge Bondy?

The Court: He has not testified here at all. You can ask him here, and if he contradicts himself you can bring that testimony before him.

Q. Did you give this second power of attorney marked Exhibit 2 for the purpose of limiting this first power of attorney?

A. No. I gave him that to collect the check.

Q. I see, and there was no intention of limiting the first power of attorney by that second power of attorney?

A. What?

Q. There was no intention of limiting the first power of attorney by that second power of attorney?

A. No.

[fol. 32] Q. Let me ask you this. You heard the conversations between Mr. Prussian and Mr. Catanella in New York?

A. A number of them.

Q. And you heard Mr. Prussian tell Mr. Catanella in the District Attorney's office that he had the right and authority to endorse that check?

A. I heard him tell him that he thought he had the right.

Q. Mr. Prussian notified you on several occasions that the Government had allowed the claim for refund? Is that not a fact?

A. He notified me that the Government had allowed the claim for refund in the Jennie E. Mackay Estate, but there was no appropriation of money to pay for it.

Q. But during the pendency of the proceeding at Washington Mr. Prussian kept you continuously informed as to the progress that was being made in that case, is that not a fact?

A. He told me yes, several times the progress that was being made in the case.

Q. I show you a copy of a letter dated January 22, 1926, and ask you whether you ever saw the original of that letter (hands paper to witness)?

A. I think I have it here.

Q. Will you produce it here?

A. If I have it. Yes. I have it here.

Q. May I see it, Mr. Miller?

(The witness produces a paper.)

Q. You received this letter from Mr. Prussian in the ordinary course of business, did you not?

A. I received that letter.

Mr. Turk: I offer it in evidence.

[fol. 33] Mr. Henry: May I see it, Mr. Turk?

(Mr. Turk hands paper to Mr. Henry.)

Mr. Henry: No objection.

(The paper in question is received in evidence and marked Defendant's Exhibit C.)

Q. I show you a *letter* of a letter dated April 2, 1926, purporting to be sent to you by Mr. Prussian and ask you whether you have the original of that letter? Pardon me, Mr. Miller, I have the original of that letter here. It was on the District Attorney's table. I show you this letter and ask you whether this is the letter that you received from the defendant with respect to the Jennie Mackay Estate?

A. Yes.

Q. There is not any reference in that letter to any request for a power of attorney is there?

A. Pardon me?

The Court: You might just as well read those letters, Mr. Witness.

The Witness: It does not speak of a power of attorney. It speaks of a blank to be sent to Mr. Mackay for execution.

Q. Did that blank with that letter refer to any outstanding income tax liability?

A. That was a paper which we executed enabling him to get the check.

Q. You say the letter referred to that?

A. No; I say this letter is just previous to it.

Mr. Turk: I ask that that be stricken out as not responsive to my question.

[fol. 34] The Court: You had better read the letter.

(Mr. Turk reads to the jury Defendant's Exhibits A, B and C, and also Defendant's Exhibit D.)

Q. Do you remember telling Mr. Prussian that that check for refund in the Jennie Mackay Estate should be made payable to Mr. Prussian and Kay & Kay?

A. I told Mr. Prussian——

Q. Please answer the question yes or no. Do you remember telling him that?

A. Yes. I told him that the check for the fee should be paid to the joint order.

Q. I don't wish to interrupt you, Mr. Miller, but I asked you——

The Court: He has a right to answer your question and make proper explanations of it.

The Witness: I told Mr. Prussian that the payment of the fee should be made to the joint order of Kay & Kay and Aaron Prussian.

Q. Do you also remember saying that you would not discuss the question of Mr. Prussian's fee until the entire check was turned over to him?

A. No. I did not.

Q. You say now that you never made any such statement?

A. No.

Q. You are sure of that, are you?

(No answer.)

Q. Are you sure of that, are you?

A. I think so to the best of my knowledge.

Q. Did you not ever insist upon having the entire check turned over to you before you would discuss the question of Prussian's fee?

[fol. 35] Mr. Henry: The question was, was there any such question raised in reference to Kay & Kay and Prussian, and now he talks of Prussian's fee. I object as to form.

The Court: He can ask the question.

Q. Let me make this clear. You wanted the entire check before you would discuss the question of fee in the case. Is it not a fact?

A. Yes, because it was payable to the order apparently of Malcolm S. Mackay as administrator.

Q. You did not want to discuss the proposition of Prussian's fee at all, did you?

Mr. Henry: I ask that the question be so framed as to fix the time.

The Court: Why do you want to go into that?

Mr. Turk: I want to bring out the fact that Prussian never had been paid for the Duncan Mackay Estate, and held that check for the purpose of adjusting his fee. Under the first power of attorney which was on file at Washington, and which was not intended to be limited by the second power of attorney, Prussian had the right to make arrangement with respect to his fee and deduct it from that check.

The Court: The question is did he have authority to sign it.

Mr. Turk: I think we will be able to convince your Honor that he did.

The Court: That is the issue you have here.

[fol. 36] Q. Did you want to give Prussian the 25 per cent that he was entitled to as his retainer out of the Jennie Mackay Estate?

A. No.

Q. Yes or no.

A. I could not.

Q. Yes or no.

The Court: I am going to exclude that. You can take your exception on that. I am not going to let you inquire as to whether a dispute arose between Mr. Miller and Mr. Prussian as to how his fee should be paid. The only question is whether Prussian had Mackay's authority to sign his name to this warrant or check.

Mr. Turk: I respectfully except.

Mr. Henry: I offer this check in evidence, as Government Exhibit No. 2.

(Mr. Turk reads the check to the jury.)

Q. Mr. Miller, Mr. Prussian never denied any of the facts to you, did he?

(No answer.)

Q. I mean he always gave you the information as the case went on?

A. Yes; he kept me posted up to the time that he collected the check.

Q. And never in your presence did he deny having signed the name of Malcolm S. Mackay?

A. I never heard him deny signing it.

Q. As a matter of fact he always said that he signed it, and that he had a right to do so?

A. That was in Mr. Catanella's presence.

Mr. Turk: That is all.

[fol. 37] Redirect examination.

By Mr. Henry:

Q. When did you first find out that Mr. Prussian had endorsed this check, which is Government Exhibit No 2?

A. I did not find that out, that he had received the check at all until six months after he had it.

Q. He did not keep you posted about that during that six months, did he?

A. No.

Q. He did not tell you that he had collected the check from the Collector of Internal Revenue until six months later?

A. No. I discovered that by accident.

Q. Did Prussian ever tell you he got the check from the Collector of Internal Revenue?

A. No; he never told me.

Q. Did he ever tell you about signing Mackay's name on the check?

A. He made the statement that he had a right to do it.

Q. When did he make that statement?

A. The statement as I remember was made when he was before Mr. Catanella in New York.

Q. He was the Assistant United States Attorney in New York?

A. Yes.

Q. In the United States Attorney's office he made that statement?

A. Yes.

Q. But he did not write you a letter at the time he received that check telling you that he had received it or that he had endorsed Mr. Mackay's name on the back of it, did he?

A. No.

Mr. Henry: That is all.

[fol. 38] Recross-examination.

By Mr. Turk:

Q. You testified that you gave Prussian that second power of attorney so that he could go to Newark, the Collector's office, and get the check?

A. Yes.

Q. You knew that the check was in the Collector's office?

A. Yes, but I did not know that he received it.

Q. But you knew that he went over there to get it, did you not?

A. I presumed so.

Q. As a matter of fact, did not Prussian talk to you upon receipt of this check by him with reference to the fees that he was entitled to in the Duncan Mackay and the Jennie Mackay Estates?

A. No. Never.

Q. When was the last time prior to meeting Mr. Prussian in Court that you heard from Mr. Prussian with respect to that check?

A. I never heard from him about the check. The last time I saw Mr. Prussian. Was that the question?—Was when I delivered the power of attorney for him to go over and receive it.

Q. Is it not a fact that Prussian told you that he had the check?

A. No.

Q. Just a moment, just a moment, and is it not a matter of fact that you wanted Prussian to adjust the differences with Kay & Kay at Washington before you would pay him his fee out of the Mackay Estate?

A. No.

Q. Would you say that there was no difference between you and Kay & Kay of Washington with reference to the fee in the case?

A. Kay & Kay had notified me if I paid the entire fee to Mr. Prussian they would hold Mr. Mackay liable on a quantum meruit for services rendered.

[fol. 39] Q. Exactly, and that was the reason you did not want to pay Prussian his fee. Is that not a fact?

A. That is the reason ——

Q. May I get an answer.

The Court: He has answered.

The Witness: That is the reason why the check would be drawn to the joint order of Kay & Kay and Aaron Prussian.

Q. You say there was a dispute with respect to the fee claimed by Kay & Kay?

A. Yes.

Q. Did you hear from Kay & Kay after Mr. Prussian went to the Newark Collector's office?

A. No.

Q. Did not Kay & Kay write you or telephone you demanding the fee from you as to the Jennie Mackay Estate?

A. They did not know the check had been received. Nor did I.

Q. You say you did not hear from them?

A. I heard from them before the check was paid.

Q. Did you hear from them after the check was paid?

A. No.

Q. Then you don't know whether they knew that the check had been paid or not, do you?

A. I had not any knowledge.

Q. Then why did you say that they did?

Mr. Henry: I object to the form of the question.

The Witness: I don't follow.

Mr. Turk: I will withdraw it.

Mr. Turk: That is all.

[fol. 40] By Mr. Henry:

Q. In other words, Mr. Miller, Kay & Kay and Mr. Prussian all wanted the fee, and you did not care which one got it, and that is why you wanted the check made out to all three of them?

Mr. Turk: I object to the question as to form
The Court: Overruled.
Mr. Turk: Exception.

Q. And that is why you wanted the check made out to the three of them?

Mr. Turk: I object to the question as being incompetent, irrelevant and immaterial and also as leading.
The Court: Overruled.
Mr. Turk: I respectfully except.

Q. Is that right?
A. I wanted to pay the fees to both of them and to be relieved from all responsibility or liability to either.
Q. Then you would not be in danger of paying the wrong party?

Mr. Turk: I object to the form of the question.
Mr. Henry: I will withdraw it. That is all.

By Mr. Turk:

Q. Was there a written retainer in the case retaining Kay & Kay?
A. No.
[fol. 41] Q. But there was a written retainer retaining Aaron Prussian?
A. He acted as the representative in the matter.
Q. I asked you whether there was a written retainer retaining Aaron Prussian?
A. Yes.
Q. And was there a written retainer retaining Kay & Kay?
A. No; verbal agreement.

Mr. Turk: That is all.

By Mr. Henry:

Q. When you made this verbal agreement were Morris Kay and Aaron Prussian both there?
A. Yes.

Mr. Turk: I object to that on the ground that it is oral tending to vary the terms of a written instrument.
The Court: Overruled.
Mr. Turk: I respectfully except.

Q. Was Aaron Prussian associated with Kay & Kay at that time when you first retained Kay & Kay?

A. Yes; the correspondence also proves it.

Q. Have you any of that correspondence here?

The Court: I don't think that that is material.

Mr. Henry: I will withdraw it. That is all.

Mr. Turk: May I ask that the latter part of the witness's answer be stricken from the record?

The Court: It is immaterial as far as this case is concerned.

[fol. 42] By Mr. Henry:

Q. Were you sworn as a witness before you testified here today?

A. Why, I stood up here in front with all the others and was sworn.

Q. I wanted that to appear on the record.

The Court: It does not have to appear on the record.

Mr. Henry: That is all.

John L. Sullivan, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Henry:

Q. What is your occupation?

A. United States Secret Service Operator.

Q. How long have you been in the United States Secret Service?

A. Since 1916.

Q. You have seen Aaron Prussian before, have you not?

A. Yes.

Q. When did you first see him, about, the date? Can you remember?

A. About the first of January, 1927.

Q. Were you directed to investigate this case?

A. I was.

Q. Did you have any conversation with Mr. Prussian on that first occasion?

A. Yes.

Q. What did you say to him and what did he say to you as near as you can remember?

A. Well, I explained the reason for my investigation of Mr. Prussian, and showed him the check, and also the affi- [fol. 43] davit as filed by the administrator of that estate, Malcolm S. Mackay, and he claimed at that time that he was within his rights in withholding and using the check until his differences were adjusted by the administrator.

Q. Did he say using it?

A. Using it.

Q. I show you Government Exhibit No. 2 (hands a paper to witness). Is that the check that you referred to?

A. That is the check.

Q. Did you at that time or subsequently have Mr. Prussian write out a statement and sign it and give it to you in regard to this case?

A. Yes.

Q. I show you this piece of paper and ask you to tell the Court and jury the circumstances, what the circumstances were, and the conservation as near as you can remember it leading up to Prussian's signing that statement?

A. Prussian and I had had several interviews concerning this check, and I asked him to put it in writing, and he prepared this form, and signed it.

Q. In your presence?

A. In my presence.

Mr. Henry: I offer that in evidence.

Mr. Turk: No objection.

(The paper in question is received in evidence and marked Government Exhibit No. 4.)

Q. Did you have any further conversation with Prussian at any time with regard to this case?

A. At that time Mr. Prussian claimed that he was willing to make restitution in the amount of the check.

Q. To whom?

A. To the Government or to the estate, and before I ar- [fol. 44] rested Mr. Prussian or took him into custody, I gave him an allowance of about two or three weeks, so that he might be able to gather this money together, but he failed to do it, and I submitted the matter to the United States Attorney for the Southern District of New York.

That was in view of the fact that Mr. Prussian acknowledged that he went to Newark, and got that check, and brought it to his office in New York, and endorsed it in New York.

Q. And so if he endorsed it in New York you thought that jurisdiction would lie in New York?

Mr. Turk: I object to that question.

Q. He told you that he had endorsed this check, Government Exhibit 2, in New York, in his office?

A. That is what he told me.

(Mr. Henry reads Government Exhibit No. 4 to the jury.)

Q. Did Mr. Prussian ever make any explanation why he was not able to make this restitution? What did he say about restitution?

A. He said he was not able to raise the amount of money at that time.

Mr. Henry: Your witness.

Cross-examination.

By Mr. Turk:

Q. Did Mr. Prussian use the word restitution to you?

A. I believe so.

Q. Are you sure that he did, or is that the conclusion that you drew from what he said to you?

A. That might be my own conclusion. Yes.

[fol. 45] Q. In other words, you say that the word restitution might be your conclusion from what he said to you at the time?

A. That was our conversation as regards restitution for the check.

Q. When you asked Mr. Prussian for a statement with reference to that check he gave it to you willingly, did he not?

A. He did.

Q. Very willingly?

A. Yes.

Q. He did not deny any of the facts in the case to you, did he?

A. No.

Q. And you had absolutely no trouble in getting him to give you a complete statement of the facts?

A. No; he gave them willingly.

Q. Do you remember seeing this defendant Prussian with approximately $7,500 in certified checks in his pocket?

Mr. Henry: I object to that as being immaterial.

Mr. Turk: It is very material.

The Court: The objection is overruled.

The Witness: No.

Q. Do you remember seeing this defendant in possession of any certified checks?

A. No. Well he did not have possession of the checks. The lawyer had possession of the checks. I can't recall the lawyer's name.

Q. Do you remember the amount of those checks?

A. He had some checks which he claimed were 35 checks, and the total amount was $7,500.

Q. In other words, the amount was the total amount which Prussian claimed was due the Mackay Estate?

A. That is what he represented to Judge Goddard.

[fol. 46] Q. It is not a fact that Mr. Miller as representative for the Mackay Estate refused to accept anything less than the full amount of the check?

A. No. The facts were submitted to Federal Judge Goddard and he passed on them. He offered to pay the amount provided the case was dismissed and Judge Goddard refused.

Q. Do you remember a conversation at which Mr. Miller said that he would not have any discussion with the Judge or the District Attorney or anyone else unless the full amount of the check was paid?

A. No. He said that it was in the hands of the United States Attorney at that time. That was two years after.

Q. Do you remember any conversation in which Mr. Miller said that?

A. There was a conversation to that effect.

Q. Did you hear Prussian say that there was a fee coming to him and he wanted payment of his fee?

A. Well, a lawyer representing Prussian at that time made such a statement.

Q. Do you say now that you did not hear Prussian make that statement?

A. Yes; I did not hear Prussian make that statement.

Q. Pardon me.

A. Yes; I did not hear Prussian make that statement.

The Court: He says he heard a lawyer who represented him make that statement.

Q. Do you remember your testimony before Judge Bondy in New York?

A. I remember some of it.

Q. Do you remember this question: "Did you ever hear Mr. Prussian say since you first met him, Mr. Prussian, that he wanted his money?"

[fol. 47] "A. I heard him say he wanted his money." Do you remember saying that?

A. Yes.

Q. Do you remember this question and answer: "Did you not hear him say that he wanted his money? A. Yes, sir." Do you remember that now?

A. Yes, sir.

Q. Does that serve to refresh your recollection?

A. Yes.

Q. So that you did hear Prussian make the statement that he wanted his money. Is that right? (No answer.)

Q. Do you remember this question by the Court: "How many times did you hear him say it?

A. Probably two or three times." Does that serve to refresh your recollection?

A. Well, he has made that statement at every conversation I had with him, that he wanted to be paid his fees.

Q. He said that the very first time you met him, did he not?

A. Yes.

Q. Do you remember this question by the Court: "Did you ever hear anybody say that Mr. Miller would not let him take his money?" and you answered "I learned from Mr. Miller that he had written a letter as to the differences between him and Kay & Kay who were supposed to be associated with Mr. Prussian, and as soon as they had adjusted their differences he would be able to comply with the terms of the contract. That is what he told me." Do you recall that testimony?

A. Yes.

Q. Do you remember this question, Mr. Sullivan: "Did you hear Mr. Miller say in the hallway in your presence that he wanted the entire amount of the check?

A. What conversation was that?

A. A general conversation."

Mr. Turk: I withdraw that last part.

[fol. 48] Q. Here is a question put to you by Mr. Catanella, the Assistant District Attorney: "A question has been put to you that Mr. Miller asked for $10,000. Is it not a fact that Mr. Miller during the period that this case has been on the calendar, and during the time that Mr. Prussian has made offers to the Government to repay this money, is it not a fact that Mr. Miller said the amount of the check was $9,044.37, and until the defendant would produce that amount he could not entertain any discussion, either yourself, the Government, or the Judge," and your answer was yes. Do you remember that question and answer?

A. If it is in the minutes of the Court it must be so.

Q. Do you recollect your testimony?

A. I can't recall it.

Q. Would you say that you did not so testify before Judge Bondy?

A. No; I would not say that I did not testify to that. I must have testified to that.

Q. So that you testified in New York about Prussian making offers to Miller of the amount due the Mackay Estate, and that Miller would not take the offer of Prussian unless he got the full amount of the check? Is not that a fact?

A. No: Mr. Miller had no authority to make any agreement with Mr. Prussian, because it was in the hands of the United States Attorney at that time, and it was before that trial that they brought up that discussion about this.

Q. I asked you whether or not that testimony did not indicate that Prussian had made offers to Miller, and that Miller would not take anything except the full amount of the check. Is not that the substance of that conversation?

A. Yes.

Mr. Turk: That is all.

[fol. 49] Redirect examination.

By Mr. Henry:

Q. These various offers of payment were made after charges had been preferred against the defendant, were they not?

A. After the defendant was indicted.

Q. They were made with the idea of quashing the indictment, were they not?

A. Yes, sir.

Mr. Turk: I object to the form of the question and move that it be stricken out.

The Court: The objection is overruled.

Mr. Turk: Exception.

Mr. Henry: That is all.

Recross-examination.

By Mr. Turk:

Q. You spoke to Prussian prior to his indictment?

A. Prior to his indictment?

Q. Did you?

A. Yes.

Q. And he told you prior to his indictment that he thought he had a right to endorse that check?

A. I believe he said something like that, that he thought he was within his rights.

Q. Did he not say it in that written statement that you took?

A. Yes.

Q. Why do you say you believe? He said it, did he not?

A. Well, he said it.

Q. You did not have Prussian write anything in this statement about where the check was endorsed, did you?

A. No; I left that to himself. He made that statement himself.

Q. You wanted a complete statement of the facts, did you not?

A. I did not dictate it.

[fol. 50] Q. I say that you wanted a full and complete statement of the facts, did you not?

A. I asked him to give them to me.

Q. You are a Secret Service Operator?

A. Yes.

Q. Did you not think it was important to have Prussian write in that statement where that check was endorsed?

A. No; it was not necessary. I could not compel him to do that if he did not want to do it.

Q. You did not think it was necessary to find out where that check was endorsed?

A. I did not have any authority to compel him to put it in that statement. I asked him to give me a statement on the facts when I spoke to him.

Q. And you said he was very willing to give you the statement?

A. Yes.

The Court: He has answered your question. There is no use going into it any further.

Q. Did you not think it was important to find out?

The Court: It does not make any difference whether it was important or not. He has answered your question, that he did not think it was material, what was left out.

Q. After receiving this statement from Mr. Prussian did you discuss the facts of the case with Mr. Miller or with Mr. Mackay?

A. I did not.

Q. You spoke to them about the case, did you not? Before whom did you discuss that statement?

A. With the United States Attorney, Mr. Catanella, in the Second District.

[fol. 51] Q. Did Mr. Miller or Mr. Mackay in your presence ever deny any of the things that Prussian said about this case?

A. Not to me.

Mr. Turk: That is all.

By Mr. Henry:

Q. Did you ask them anything about it? What Prussian said?

A. I did not ask them anything. I went up to the United States Attorney after I produced this man before——

Q. Before Judge, did you go before Judge Goddard with Mr. Miller in the Southern District?

A. I did.

Q. Was that in reference to making a refund?

A. It was.

Q. In other words, Mr. Prussian offered, did he, to return this money?

A. Through this attorney. I understood at that time that this attorney represented his brother in Detroit, that this was his brother's money in Detroit, that this was his brother's money in Detroit.

Q. Did you go before Judge Goddard to take it up?

A. Yes.

Q. Was the defendant there?

A. The defendant was there.

Q. Do you remember what was said by the Judge to the defendant, and what the defendant said, and what was said by those present to the defendant, and what the defendant said?

A. I recall that his lawyer made this statement, that he wanted some sort of an agreement that if they made this refund of $7500 the indictment should be quashed, and when the Judge would not agree to that he would not agree to make the refund.

[fol. 52] Q. Was Mr. Miller there?

A. Yes.

Q. And the Judge would not consent to allowing any such agreement to be made?

A. He would not.

Mr. Henry: That is all.

By Mr. Turk:

Q. That all happened prior to the trial of the case in New York, did it not?

A. Yes.

Q. And you knew all that when you testified before Judge Bondy, did you not?

A. I knew it, yes. I was familiar with it.

Q. And yet in response to the question by Mr. Catanella that I read a little while ago from your testimony in New York you testified that Mr. Miller wanted the entire amount and would not entertain any discussion either with Mr.

Catanella, the Government, or anybody until he got the full amount. Did you not so testify?

A. No; that was the general conversation in the hall.

Q. Did you not so testify?

A. If it is in the record.

Q. If I told you that it was in the record would you say that you so testified?

A. If it is in the record I did, but not before Judge Goddard.

The Court: I don't see that it makes any difference.

Mr. Turk: He testified a few moments ago about this conversation before Judge Goddard, and yet in his testimony before Judge Bondy which came later he said nothing about it.

[fol. 53] The Court: He probably was not asked about it.

Mr. Turk: But he was asked about it. I want to read his testimony about it.

The Court: I don't want you to go into all this collateral issue. I won't let you question this witness any further on that. I don't see any difference between his statement now and his statement then as far as I can get it from your question.

The Witness: There was absolutely no such conversation before Judge Goddard.

Q. Who was present at that conversation before Judge Goddard?

A. May I ask what conversation you are referring to?

Q. The conversation you testified to just a few moments ago in response to Mr. Henry's question. You testified about some conversation that took place before Judge Goddard. I understood it to be—was it in his Chambers?

A. On those two certified checks?

Q. Yes.

A. Who was present?

Q. Yes.

A. The United States Attorney, the Assistant United States Attorney Mr. Catanella, this attorney, Mr. Blank, attorney Blank, and the defendant, Mr. Miller, Mr. Mackay, and myself.

Mr. Turk: May I ask your Honor to strike from the record all testimony with respect to the conversation with

Judge Goddard, on the ground that that is a statement made to the Court, and may I add that Judge Bondy struck that testimony from the record.

[fol. 54] The Court: Very well. It will be stricken out. You are to disregard the statement that was made in the presence of Judge Goddard in reference to the settlement of the case by payment of the amount that he owed.

Mr. Turk: That is all.

GEORGE S. COURTER, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Henry:

Q. What is your occupation?

A. Internal Revenue Deputy Clerk in Newark.

Q. You are in the Newark Office?

A. Yes.

Q. How long have you been there?

A. Since 1919.

Q. I show you Government Exhibit 2 and ask you if you have seen that before? (Hands paper to witness.) Have you?

A. I could not say that I did.

Q. Do you recognize Mr. Prussian as having seen him before?

A. I do.

Q. When was the first time you saw him in reference to the Mackay Estate?

A. On April 6th, 1926.

Q. And did you have a conversation with him at that time?

A. Only that he came in and inquired if we had a check for the Mackay Estate?

Q. What did you do?

A. I looked up the matter and told him yes. He wanted to know if he could get the check. He said he had a power [fol. 55] of attorney. He said his power attorney was filed. I said we had no record and before we could release the check it would be necessary to have a power of attorney

on file. I took him to Mr. Wilson who was at the head of the Income Tax unit, and then Mr. Prussian left.

Q. Did you see him again that afternoon?

A. That afternoon he came back, and as I was coming into the office he was going out.

Q. Did you see him again after that?

A. No.

Mr. Henry: That is all.

Cross-examination.

By Mr. Turk:

Q. Have you any special form of power of attorney in your office?

A. No.

Q. And there is a statement required by your office before a check is paid that there is no other outstanding liability from the person receiving the check, and that must be filed in your office before payment is made. Is that not so?

A. It must be retained up to a certain amount, that is the procedure.

Q. That statement referred only to outstanding tax liabilities due the Government?

A. Yes.

Mr. Turk: That is all.

Mr. Henry: That is all.

[fol. 56] William E. Wilson, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Henry:

Q. What is your occupation?

A. Chief of the Income Tax Unit of the Fifth District of New Jersey.

Q. Your office is in Newark?

A. Yes.

Q. How long have you held such position?

A. I have held that position since 1924.

Q. Do you remember seeing the defendant Aaron Prussian in April, 1926?

A. I do.

Q. Do you remember about what date it was? Was it the early part of April or the latter part of April?

A. The first part of April.

Q. Did you have any conversation with Mr. Prussian?

A. Mr. Courter brought him into my office, and said that he was over for a check for the Mackay Estate, and Mr. Courter did not want to give it up unless he was sure that Mr. Prussian had some authority to receive it, so I also told Mr. Prussian that he would have to produce a power of attorney before he could release the check.

Q. And did he leave the office immediately after you told him that?

A. He did, yes.

Q. Did you see him again?

A. He came back again right after that, it must have been after one o'clock.

Q. Did he have any conversation with you at that time? What did he say to you and what did you say to him?

A. I do not think so. I think he then brought the power of attorney and I took him outside and we released the check.

[fol. 57] Q. Did he say "This is the power of attorney?"

A. I don't remember what was said. I know he gave us the power of attorney and we released the check.

Q. I show you this paper, Government Exhibit No. 3, and ask you whether this is the power of attorney that you referred to? (Hands paper to witness). Is that the power of attorney you refer to?

A. That is the one, yes.

Q. And after you received that did you deliver the check to Mr. Prussian?

A. I delivered the check to Mr. Prussian.

Q. Referring to Government Exhibit No. 2, is this the check?

A. I believe it is, yes.

Mr. Henry: That is all.

Cross-examination.

By Mr. Turk:

Q. As a matter of fact, you never saw this check before, did you?

A. That check?

Q. Yes, this check?

A. Is that the same one he showed me?

Q. That is the very check you just looked at.

A. Yes, sir, I did. Yes.

Q. Does your Department, the Internal Revenue, issue those checks?

A. No.

Q. Does your Department, the Internal Revenue Department, have charge of handling those checks?

A. Handing them out, yes.

Q. Will you say that a young lady in your department in your office did not hand that check out?

A. In my presence, yes.

Q. How many checks do you handle in a day?

A. It depends, some days there are only a few, and another day dozens come in.

[fol. 58] Q. Do you remember the date that the check was handed out?

A. April 6th.

Q. You remember particularly that it was on April 6th, 1926, three years and four months ago?

A. Yes.

Q. Did anybody talk to you about this case?

A. In which way do you mean?

Q. Did anybody talk to you about your testimony in this case?

A. No; only asked questions if I had a power of attorney, what information we had on it. That is all.

Q. And you recall definitely now in spite of all the work you do in your office that on April 6th, 1926, Mr. Prussian came in and you gave him that check and you saw that power of attorney was shown to you a few minutes ago? Do you recall that very definitely?

A. I do.

Q. How many of these cases have you a day?

A. Which are brought to my special attention?

Q. Yes.

A. Not very many.

Q. How many a day?

A. Well, maybe one a day, and maybe three or four.

Q. Do you remember the wording of all the papers that you look at?

A. No.

Q. Do you remember the wording of the paper that Mr. Henry showed you?

(No answer.)

Q. Do you?

A. Part of it, yes.

Q. This was just an ordinary case in the ordinary course of business in your office, was it not?

A. No. I would not say it was. No.

Q. How many claims for refunds were filed with the Col-

A. A great many.

Q. And this claim arose out of a claim for refund?

A. Yes.

[fol. 59] Q. You have a great many claims looked up in your office, have you not?

A. Not looked up, no.

Q. Your office had nothing to do with fixing the amount of the refund, did it?

A. Not the amount.

Q. That was done by the Washington office, was it not?

A. Yes.

Q. And this check from the Washington office was sent to your office simply for delivery to the proper person?

A. Yes.

Q. How many checks a day does your office receive from the Collector of Internal Revenue for all purposes on an average?

A. I can't give you the exact number. Maybe three or four hundred in a day or maybe only one hundred.

Mr. Turk: That is all.

Mr. Henry: That is all.

JUDAH L. BUCKMAN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Henry:

Q. Do you know Mr. Prussian, the defendant?
A. Yes.
Q. How long have you known him? About how long?
A. About six or seven years.
Q. I show you this Government Exhibit No. 2, this check, and ask you did you get that check, did you cash that check for Mr. Prussian. (Hands paper to witness.) Is that your endorsement on the back?
A. Yes.
[fol. 60] Q. And where did you cash it for him?
A. I cashed it at Sea Gate in my house.
Q. Sea Gate. Where is that? Down in Coney Island?
A. Coney Island.
Q. What was the conversation at the time? What did you say and what did Mr. Prussian say?
A. Mr. Prussian owed me two instalments on a second mortgage, and he did not pay me, and he said that he expected some check, and when he will receive the check he will pay me the instalment, and will give me something on account of the mortgage. Mr. Prussian owed me two instalments on a second mortgage, and when I asked him for it, when my bookkeeper asked him for it he said he expected some checks from Washington and as soon as he gets the check he is going to pay off the two instalments, and will also give me something on account, a couple of thousand dollars on the mortgage, and when he came in that money he asked me if I could give him change for this check. I told him I have not got so much money now. He sent me a check for $9,000 and wanted I should give him change. I told him I have not go so much money. He told me he is going to pay the two instalments, and give me $2,000 or $2,500—I don't remember exactly.

The Court: You will have to speak louder. This is important to these people that you speak out. Stand up and speak louder.

Q. Just tell his Honor and the jury all Mr. Prussian and you talked about.

A. Mr. Prussian came into my house and he said he re-[fol. 61] ceived the check, he has the check, and if I could give him change for this check. I told him I have not got so much. He told me he is going to pay the instalments that is due me, and also he is going to give me $2,000 or $2500, I don't remember exactly how much he gave me on that. I told him that after I deducted that I will not be able to give him the balance immediately, that I could give him two checks, one check he could cash right away, and the balance he could cash it in a couple of days after. He said he wanted to endorse the check. There was no ink in my house, and my bookkeeper was not there. He went to his house and took a fountain pen and endorsed the check. That endorsement of the check I saw he endorsed it as Aaron Prussian attorney, and I said I wanted an individual endorsement, and he endorsed it as an individual endorser also, and then I went to the bank to see if the bank will give me a credit on that check, and the bank accepted the check, and said it was O.K., and then I gave him a receipt for the amount that I received on the mortgage, and I gave the check, the balance, whatever I owed, the balance of the check. That is what happened.

Juror No. 5: How much money did Mr. Prussian get at that time from you?

The Witness: He got about around $6,000, from five to $6,000.

Q. That was his change after he paid off the amount on the mortgage?

A. Yes.

Mr. Henry: That is all.

[fol. 62] Cross-examination.

By Mr. Turk:

Q. Are you sure of that amount?

A. I am not sure exactly. I recollect that I gave him two checks change.

Q. Do you recall the amount if those checks?

A. I can't remember it now. I got it in my books.

Q. As a matter of fact he told you $1,500 in anticipation of some mortgage?

A. He owed me about $1200 or $1400, on instalments, and gave me also on account of the $2,000 or $2500. I don't remember.

Q. You say now that the amount was not $1500 he owed you under that mortgage?

A. Not what he owed me. He owed me about $5,000.

Q. Will you say now the amount was not $1500?

A. On what was due?

Q. Yes.

A. About what was due was $1500.

Q. And you gave Prussian two checks totalling the difference?

A. He gave me an account of the purchase money mortgage $2,000 or $2500. I could get that by telephone from my office, all the figures.

Q. Will you say now that you got more than $1500 plus an additional payment of $600 from Aaron Prussian at that time?

A. Yes. Sure I got more.

Q. More than $2100 at that time?

A. Yes; at that time.

Mr. Turk: May I ask that your Honor give this witness an opportunity to telephone his office and find out the amount.

The Court: Find out exactly what Mr. Prussian paid you, and what you paid him back out of the check.

[fol. 63] Mr. Henry: Mr. Turk concedes that Mr. Mackay is the administrator to the will annexed of the estate of Jennie E. Mackay, and was ever since Mrs. Mackay's demise. The defendant also concedes that Malcolm S. Mackay did not endorse his name on Government Exhibit 2, which is the refund check.

Mr. Turk: We will concede that if Mr. Mackay were here his testimony would be the same as it appears on the record at the first trial. We will take all of Mr. Mackay's testimony.

The Court: I don't know that the Government wants to offer all of it.

Mr. Henry: I don't see how we can.

Mr. Turk: I told Mr. Henry originally that I would stipulate as to Mr. Mackay's testimony only. That was Mr. Henry's suggestion.

Mr. Henry: No. I wanted him to concede that Mr. Mackay was the administrator and that he had been and also that he did not sign this particular check. Mr. Turk said that he would not have the privilege of cross-examining, and I said "What do you want". If he wants his testimony in evidence I have no objection to what he testified to in the former trial.

The Court: I think you can offer his testimony if you want to.

He has a right to be confronted with the witness. At the same time he can make any admission that he wants to.

Mr. Turk: My understanding of the Government's re-
[fol. 64] quest at the time was that I would stipulate Mackay's testimony. I said I would be willing to stipulate Mackay's testimony, but simply to take one or two items out is not what I intended when I said I would stipulate.

Mr. Henry: All I said was that we could not get Mackay because he was out in Montana on a hunting trip. If you do not want to try the case now I will adojurn it so that you can get the information which you wish, or you can stipulate that Mackay is the administrator to the will annexed of Jennie E. Mackay, and that he did not find his name on the back of this check. If not we will adjourn the case.

Mr. Turk: I do stipulate to that, because this is part of his testimony.

The Court: My understanding is that the Government cannot stipulate to what a man may testify in a criminal case.

You concede that Mackay was the administrator and that he did not sign his name?

Mr. Turk: That was my understanding at the time I agreed to stipulate.

Mr. Henry: You can offer it if you like. You represent the defendant.

Mr. Turk: I can't make any concession for the purpose of the record unless Mackay's entire testimony is taken.

Mr. Henry: You can offer it. I can't offer it. I am stopped by the Court from doing that.

Mr. Turk: Is this proposition different from stipulating as to the testimony of a Government chemist?

[fol. 65] The Court: Yes. You don't stipulate what the Government chemist will testify, but you stipulate that those are the facts.

Mr. Turk: In addition to that stipulation I understand the District Attorney will stipulate that Mackay authorized the attorney Miller to retain Mr. Prussian.

Mr. Henry: That is what he said, that he authorized Mr. Miller to go ahead and retain Prussian. He authorized Miller to retain Prussian and Kay & Kay or anybody that he wanted.

Mr. Turk: If the District Attorney will stipulate as a fact that Mackay authorized Miller to retain Prussian in both estates I will put any concession on the record that the District Attorney wants to help prove his case, but unless he does that I can't concede anything.

The Court: You do not deny that he did authorize Miller and that Miller did employ him, that Mr. Mackay authorized Mr. Miller to employ Prussian to represent him, and that Mr. Miller employed Prussian?

Mr. Henry: Mr. Miller testified that he employed Kay & Kay and Prussian. I can't admit something that I don't believe to be true.

Mr. Turk: The point I am getting at is this. On page 3 and on page 18, my recollection of the testimony is that Mackay testified that he authorized Mr. Miller to retain Mr. Prussian in both estates. I don't want to quibble about Kay & Kay or anyone else. He says he authorized Miller to retain Prussian in both estates.

[fol. 66] Mr. Henry: That is all right.

The Court: He says though that he employed Kay.

Mr. Turk: I want a stipulation that Mr. Mackay authorized Mr. Miller to retain Aaron Prussian.

Mr. Henry: That is all.

The Court: It is conceded here that Mr. Mackay authorized Mr. Miller to employ Mr. Prussian to present this matter to the Government. Gentlemen, you will be permitted to separate during the noon recess. During that time you are not supposed to discuss this case with one another, nor are you permitted to allow anyone to discuss it with you. We will now take an adjournment until 2 P. M.

(Whereupon an adjournment was taken until 2 P. M., at which time the trial was resumed.)

JUDAH L. BUCKMAN, recalled, having been previously sworn, testified as follows:

Cross-examination.

By Mr. Turk:

Q. I understand that you cannot get the amount?
A. No, I can't get the record.

By Mr. Henry:

Q. The approximate amounts that you testified to this morning were what? How much cash did you give him and how much credit did you give him?
[fol. 67] A. I did not give him cash. I gave him checks.
Q. What was the approximate amount?
A. The approximate amount that he paid me was about $2,000.
Q. And you gave him the difference?
A. I gave him the difference in checks.

Mr. Henry: That is all.
Mr. Turk: That is all. You say that Mr. Prussian signed the endorsement on the check?
The Witness: Yes.
Mr. Henry: That is all. The Government rests.
Mr. Turk: May I ask your Honor to excuse the jury. I have a rather lengthy motion to make.
The Court: All right. The jury will be excused.

MOTIONS TO DISMISS

Mr. Turk: May it please your Honor, the defendant moves to dismiss the case, the indictment, on the ground that it is defective, defective in several particulars. The indictment is brought in two counts, the first of which alleges that the genuine draft was for $9,044, and was drawn by an officer of the United States Treasury made payable to one Mackay. The indictment charges that the defendant herein obtained possession of the draft, falsely forged the endorsement of Mackay, and uttered the draft with the forged endorsement thereon upon this last witness Buck-

man. In count one of the indictment is alleged that the de- [fol. 68] fendant did falsely make, forge, and alter a certain obligation of the United States, to wit, the endorsement on the draft, that the draft for money was duly issued to the said Malcolm S. Mackay, and thereafter the defendant obtained possession of said draft, and did then and there falsely forge the endorsement on the said draft by falsely making and forging the name Malcolm S. Mackay on the back of said draft for money, that said draft for money with the said forged endorsement thereon did together constitute a forged obligation of the United States as the defendant then and there well knew, with intent then and there and thereby to defraud. The second count of the indictment alleges that the defendant did feloniously pass, utter, and publish to and upon one J. L. Buckman, a certain forged obligation of the United States, to wit, a draft for the payment of money. In other words, both counts of the indictment refer to this so-called forged endorsement of a forged obligation of the United States.

Now, the first point which the defendant raises with respect to that indictment is that the allegation is that an obligation of the United States has been forged by the defendant, when further allegations show that the endorsement, and not the check itself was forged. That I contend is a repugnant allegation that makes the indictment, absolutely false and absolutely defective within the meaning of Section 147. I have handed up to your Honor three cases [fol. 69] which bear on the point which I am about to raise. Section 147 (Compiled Statutes 10317) defines securities and obligations of the United States dealt with in subsequent sections including Sections 148 and 151 (Compiled Statutes 10318, 10321). Section 147 is in the following language: "The word obligation or other security of the United States shall be held to mean all bonds, certificates of indebtedness, national bank currency, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money drawn by or upon authorized officers of the United States, stamps and other representatives of value, of whatever denomination, which may have or may be issued under any Act of Congress."

The Court: On what point are you raising this?

Mr. Turk: That the indictment is repugnant since it alleges that the defendant forged an obligation of the United States, and then refers to the endorsement. The endorsement is not an obligation of the United States.

The Court: The indictment is plain, is it not?

Mr. Turk: The indictment, the first count, is bad according to the De Lemos case. There the Court ruled that the indictment was absolutely defective. The two counts in this indictment are drawn following Sections 148 and 151. [fol. 70] Section 148 is in the following language: "Whoever with intent to defraud shall falsely make, forge, counterfeit, or alter any obligation or other security of the United States shall be fined not more than $5,000 or imprisoned not more than fifteen years." Section 151, which refers to the uttering of forged obligations, reads as follows: "Whoever, with intent to defraud, shall pass, utter, publish, or sell, or attempt to pass, utter, publish and sell, and shall bring into the United States or any place subject to the jurisdiction thereof, with intent to pass, publish, and sell, or shall keep in possession or conceal with like intent, any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 and imprisoned not more than 15 years." Your Honor will note that first we have Section 147 which defines what the words obligation or other security of the United States shall be held to mean, and then in Sections 148 and 151 we have the identical wording, falsely make, forge, counterfeit, or alter any obligation or other security of the United States, defined by Section 147; while Section 151 makes it a crime to pass, or utter, any obligation or security defined by Section 147.

The Court: But there are other sections.

Mr. Turk: Section 29. I will come to that later on. Section 147, which defines obligation or other security of the United States, after enumerating the particular obligation [fol. 71] and security which the quoted expression shall be held to mean does not say "or any assignment or endorsement thereof", nor does it use any equivalent expression. And we must not lose sight here of the fact that we are dealing with criminal statutes, and in those portions of their context which define the offenses they must be strictly construed. Your Honor will find that not only are the au-

thorities uniform on this question, and I will read to you the opinion of the Attorney General (22 Opinions of the Attorney General, page 40—1897—99). Section 5413 of the Revised Statutes was interpreted by him as follows: "Section 5413 of the Revised Statutes (now Section 147 of the Criminal Code) is classified under 'Title LXX—Crime', and is the first section of Chapter 5. It was first enacted as part of a separate law approved June 30, 1864 (13 Statutes, pp. 218-222) which act also contains substantially the penal provisions contained in Sections 5414, 5430, and 5431 of the Revised Statutes. The obvious intention of Congress was to group under one heading in one consolidated statute all the provisions relating to crimes against the operations of the Government contained in separate acts. It is a well-known principle of statutory construction that the transfer of a separate statute or part thereof from a particular act to a general provision does not ordinarily alter its significance. The fact that Section 5413 is separated by num-[fol. 72] ber from the succeeding related and cognate section does not necessarily extend its influence and effect over the whole volume of the Revised Statutes. The context manifestly evidences the intention of Congress to apply the provisions of that section to the construction of the sections that follow, and the history of Section 5413 and its associated origin with some of the succeeding sections under the ordinary rules of statutory construction makes this perfectly plain. In the absence of similar terms applying the provisions of Section 5413 to the whole Revised Statutes and to acts passed subsequently it can only be reasonably inferred that it was not intended that it should apply further than to the immediate context." As to Section 29, your Honor will find if you have the Gessell case there, that specifically held that this case involved the endorsement of a genuine draft, and there is no question about the fact that the draft in this case is a genuine Government draft. The only question arose with respect to the endorsement of this genuine draft. The Gessell case, and the cases that follow the Gessell case are all uniform on the proposition that cases involving forged endorsements, cannot be brought under sections 148 and 151 because the endorsement does not constitute a forged obligation of the United States; so that unless the indictment in its allegations satisfied the requirements of some other provision of the Criminal Code,

it must be held insufficient. The only other section under [fol. 73] which this indictment could possibly be brought is Section 29. Your Honor has the United States Code Annotated, and you will find that section on page 73. It provides as follows: "Whoever shall falsely make, alter, forge, or counterfeit any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving from the United States or any of their officers or agents, any sum of money, or whoever shall utter or publish as true any such false, fraudulent, altered or counterfeited deed, power of attorney, order, certificate, receipts, contract, or other writing with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited, or whoever shall transmit to, or present at, knowing the same to be false, altered, forged, or counterfeited, or whoever shall transmit to, or present at, any office or officer of the United States, any deed, power of attorney, order, certificate, receipt, contract, or other writing in support of or in relation to any action or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited, shall be fined not more than $1,000 and imprisoned not more than ten years."

Your Honor will note that in Section 29 one of the vital ingredients to make an indictment good under that section, 29, if it can be brought under that section, is the allegation "with intent to defraud the United States", and the cases [fol. 74] are specific that unless that allegation is contained in the indictment, "with intent to defraud the United States", the indictment is absolutely defective. In this indictment the first count lacks that intent. I call your Honor's attention to page 1. I also call your attention to the fourth or fifth line from the bottom of that page which reads as follows, "with intent then and thereby to defraud in violation of Title XVII, United States Code, Section (and so forth) against the peace and dignity of the United States and contrary to the form of the statute made and provided." There is no allegation of intent to defraud the United States which the cases hold is essential under Section 29. In the second count the intent is alleged "and with intent to utter the same as true and genuine, and with intent then and thereby to defraud against the peace and dignity of the United States, and contrary to the form of the

statute (and so on)." I said a moment ago that the allegation of an intent to defraud the United States was essential before the indictment could be brought under that section. Now, I have in the Lewis case here this opinion by the Court: "Measuring this indictment by the yardstick of this section we find that each count falls far short in very important essentials. The purpose and intent are made essential ingredients of the crime, and the intent to defraud is not stated generally and comprehensively as in some sec- [fol. 75] tions, notably Sections 148 and 151, but is restricted to a specific party, to wit, the United States. In cases like that on file, the Courts have specifically held that the criminal act of forging or uttering a forged endorsement must be done with the intent to defraud the United States, and that the failure to so state in the indictment was a fatal defect." There are some cases which hold, a long line of cases, the forgery of an endorsement on a genuine draft cannot be brought under Section 29, because the words "or other writing" referred to in Section 29 do not refer to the endorsement on a Government obligation but rather refers to a series of papers such as is referred to in Section 29. If your Honor has the De Lemos case, the point which the defendant makes is that an indictment which reads that the draft constitutes the obligation which was forged, when further averments show that the forgery consisted in the false making of the endorsement is repugnant and does not properly lay the offense. In the second count of this indictment, and I think your Honor will see at a moment what I am referring to, it says that the defendant did unlawfully, wilfully, and knowingly utter and publish to and upon J. L. Buckman a certain forged obligation of the United States, to wit, a draft for the payment of money, which was issued by an authorized officer of the United States. The second allegation in the same count says: "He, [fol. 76] the said defendant, Aaron Prussian, did then and there well know the said endorsement thereon to be false and forged." The indictment is almost identical with the indictment drawn in the De Lemos case, because there it referred in the first part of the indictment to a forged obligation, to wit, a draft, when the second averment was that it was the endorsement, and not the check, which was forged, and there the Court held that the indictment was defective. There is no question as to the repugnancy of

this allegation which makes that count absolutely bad. I have here a portion of the case. My point is that where the indictment says that we forged the check, and then later on says we forged the endorsement that is repugnant.

The Court: Don't you think that where the instrument is forged in any way that that constitutes forgery, and where it sets forth the nature of a forgery that would be sufficient?

Mr. Turk: That would be true if the allegations in the indictment were not repugnant.

The Court: Is it repugnant if you use the word forgery in a general sense?

Mr. Turk: Yes, because we are charged with forging an obligation or other security of the United States. We are charged with forging a Government check.

The Court: Before you can be charged with forgery do you think that it is necessary to forge the instrument itself by writing the Government's name on it?

[fol. 77] Mr. Turk: No, but I say that they charged us with forging that check, and then they say in the next paragraph of that indictment that we forged the endorsement. I say those two allegations in that indictment are repugnant, and make the indictment bad, and my statement is supported by the weight of authority. The Gessell case and the De Lemos, say that the indictment is absolutely bad. Here is the opinion in the De Lemos case which has been upheld in the Gessell case. The Court says here "But we find in count 1 and in counts 2 and 3 as well, a clear averment that the draft itself without the endorsement is forged. This, of course, is untrue, and is plainly repugnant to the further averment in the count that the forgery consists in the false making of the endorsement." That is identical with this case. "It is plain that counts 1 and 2 cannot be held good under Section 5421 (Compiled Statutes, Section 10193) which would have required the laying of the charge on the endorsement and not on the draft, and should have otherwise conformed to the requirements of that statute. We are of opinion that the demurrer should have been sustained, and the indictment quashed." That opinion of the Court in the De Lemos case was referred to in the Gessell case, and the Court in the Gessell case in referring to the De Lemos case, says this: "It will be ob-

served that the Court clearly held that the counts were [fol. 78] fatally defective because it was alleged that the draft itself was forged, and that a subsequent allegation that the forgery consisted in the false making of the endorsement was repugnant. The essence of the decision is that there was a clear distinction between alleging a draft to be forged and alleging an endorsement of a genuine draft to be forged. We think this distinction sound and conformable to the fundamental principles of criminal pleading." In this indictment you have the plain allegation that the defendant forged an obligation of the United States. It says that the check itself was forged when the subsequent allegation says that he did not forge the check at all but the endorsement on the check. In Section 147 you will find what obligation or security of the United States shall be held to mean, and the cases hold that the forging of an endorsement cannot be brought under the section. If your Honor will just glance over that second count of the indictment you will see that it is identical with the indictment in the De Lemos case. There is no difference in them.

The Court: Did this case go to the Circuit Court of Appeals before?

Mr. Turk: No. This case was brought in the Southern District and was dismissed by Judge Bondy for lack of jurisdiction. These questions were not presented before Judge Bondy.

The Court: Is that all you want to say?

Mr. Turk: Then there are cases I want to present: I [fol. 79] stopped for the moment because I am of the opinion that it will not be necessary to go any further.

Mr. Henry: Suppose we settle those two points and then you can present the next one.

May it please the Court, counsel for the defendant has brought up the point that under these two sections set forth in the indictment such a crime as is charged here with this statement of facts, namely, the endorsement on a draft, an obligation of the United States, no prosecution lies. May I call the Court's attention to Hamil vs. The United States, 298 Federal, 369 (Circuit Court of Appeals, Fifth District), from which I quote the opinion of the Court: "Section 147 of the Criminal Code (Compiled Statutes

10317) includes a check such as is described in the indictment within the definition of an obligation or other security of the United States. We are of opinion that Section 148 punishes the forgery of an endorsement of such an obligation or security. The obligation to pay a genuine debt does not become complete until it is properly endorsed. A forgery of the endorser's name is as effective a method of defrauding as the forgery of the name of the drawer of the check. The demurrer to the indictment therefore was properly overruled." Therefore under that authority the prosecution for the forgery of an endorsement on a check does lie under that section. In other words, I may have a good obligation of the United States such as this [fol. 80] was when it was handed to Mr. Prussian as we allege, and when Mr. Prussian signed somebody else's name on the back of it without authority, as we allege, the instrument thereupon becomes forged, and the whole thing becomes forged. Our indictment sets forth in the very beginning, the first count, that the defendant did then and there unlawfully, wilfully, knowingly and feloniously make, forge, and alter a certain obligation of the United States, to wit, the endorsement on a draft for the payment of money. It does not say two different endorsements. It says one. It says he forged an obligation of the United States. What was it? It was the endorsement. It means exactly what it says, that he forged the endorsement. That is very plain language, and it seems to come within the case of Hamil vs. United States. The second point raised here is that they say this case comes within the meaning of the De Lemos case. May I call the Court's attention to the following, that the indictment at hand is different from the indictment in the De Lemos case because in that indictment it says: "did unlawfully, feloniously, and falsely make and forge a certain obligation of the United States, to wit., a draft for money," and then later on it says that he forged the endorsement. There is a clear discrepancy in the indictment. In one part it says that he forged the draft, and in the second part it says that he forged the endorsement. But in this case we say the [fol. 81] endorsement, so we distinguish the case on hand and the indictment on hand from the De Lemos case. In fact the indictment in this case was drawn with the De

Lemos case in mind, and we do not say he forged the draft, but we say that he forged the endorsement, so we contend that this case does not come within the meaning of the De Lemos case on that point at all. In that particular case, the De Lemos case, the Court held that the indictment was defective because of the fact that in the beginning of the indictment the pleader charged that the draft itself was forged. We do not charge any such thing in this indictment. We say he forged the endorsement. We do not say he forged the draft. Also in the De Lemos case they alleged in the three counts that the draft itself was forged. Of course, that would be bad. But we say the endorsement in both places. May I call the Court's attention to the fact also that this very Court itself has already ruled on all these points which are now being brought up in this very case, and Judge Burrows, who was sitting here a couple of months ago, I think it was the May Term, overruled this motion to dismiss the indictment. A motion was made to dismiss the indictment on this very ground, that it did not come within the Statute and that it did not contain sufficient facts to warrant a prosecution, and I cited all these very cases which are being presented now, and the Court overruled the demurrer. I don't know whether it was without prejudice or not, but I suppose it was.

[fol. 82] Mr. Turk: If your Honor will take the second count of the indictment first I think we can settle this matter. Mr. Henry is in error.

The Court: Take the first count first.

Mr. Turk: The De Lemos case does not apply only to the first count of this indictment, but also to the second count.

The Court: The second count simply charges that he uttered a false instrument.

Mr. Turk: It is worded differently. If you will read the second count of the indictment it says that the defendant did then and there unlawfully, wilfully, knowingly, and feloniously pass, utter, and publish to and upon one J. L. Buckman a certain forged obligation of the United States, to wit., a draft for the payment of money, which was drawn by an authorized officer of the United States. If that does not charge that the defendant passed a forged check drawn

by an authorized officer of the United States then I can't read plain English.

The Court: Would it not be a forged instrument if he knew it was a false endorsement?

Mr. Turk: The indictment says that he forged the draft, and he knew the endorsement to be forged.

The Court: Suppose we take the facts that he passed an instrument which he knew had a forged endorsement on it, would not that constitute the uttering of a forged obligation?

[fol. 83] Mr. Turk: It would not constitute the uttering of a forged obligation of the United States. The point that I want to raise is that this indictment says that there was a forged draft, and the second allegation says that the endorsement was forged and not the draft. The indictment is plain: it says a forged obligation of the United States, to wit, a draft for the payment of money. Then it says that it was not the forged draft, but it was the forged endorsement. Which of those two things in the indictment is correct? One of those two allegations is wrong. Which is it?

The Court: I will overrule your motion.

Mr. Turk: I respectfully except. I move to dismiss further on the ground that it affirmatively appears by the check which the Government has offered in evidence that no forgery has been committed. I respectfully direct your Honor's attention to the endorsement on this check. It is the contention of the defendant that under neither of the criteria which the Courts have laid down for the purpose of determining forgery does that endorsement on that check constitute forgery. The two criteria which the Court have laid down for the purpose of determining a forgery are as follows: 1. Does the writing charged appear upon its face to be the genuine writing of a person other than the defendant? 2. Would the writing constitute evidence against the party by whom it purports to have been made? As regards the first point it appears to be the act of the per-

[fol. 84] son who is charged with committing a forgery. In other words, would that endorsement be evidence against Mackay in the form in which it is made. I may say to your Honor that when these points were called to the attention of Judge Burrows, the Judge then indicated by his attitude on the bench—as a matter of fact as I recall he had quite a

lengthy discussion with Mr. Henry about this point, and the Judge indicated that the endorsement did not constitute a forgery. Mr. Henry asserted that it did.

The Court: For what reason?

Mr. Turk: Because it appears to be the act of the defendant. It says "Malcolm S. Mackay, Aaron Prussian, Attorney, Aaron Prussian."

The Court: I would not know if I looked at this whether the defendant intended to forge the name of Mackay and then sign his own name. The two signatures are identical. The word Mackay does not seem to be the writing of the defendant.

Mr. Turk: The only thing you can charge this defendant with in this case is that he falsely assumed to be the attorney for Mackay when he was not. In other words, that it was a false assumption of authority. If your Honor will just reserve decision on that for a moment——

The Court: Yes; I want to hear him.

Mr. Turk: The testimony in this case leaves no room for argument, and we have admitted that the defendant signed [fol. 85] the name of Malcolm S. Mackay on that check, and his own name thereafter as attorney, and then his own name in person. I will draw your Honor's attention to the case of Bailey against the United States.

The Court: I have that here.

Mr. Turk: In that case a writ of error was brought to review a judgment of conviction under Section 29. Your Honor will note in that case that the indictment was brought under Section 29 and not under Sections 148 and 151. In this case a check or draft payable by the United States through its treasurer to the order of one Hochrey as administrator came into the possession of Bailey as attorney for the estate. Bailey endorsed the check or draft in the name of the administrator, adding his own name to the endorsement. He then deposited the check or draft to his own account in the bank, pursuant to which endorsement the amount of the draft was paid by the United States to the bank. This occurred early in the year 1922 and Bailey did not account to the administrator for the moneys thus collected and received until some time early in the year 1925, when he was called upon by a special agent of the Government. The facts are almost identical. Bailey

admitted that the endorsement was his and later an indictment containing two counts was returned against him. One of the assignments of error was based on the insufficiency of the testimony to support the judgment and verdict, [fol. 86] with respect to which the Court held: "No testimony was offered at the trial tending to show an express authorization to make the endorsement in question. Nor was there any testimony tending in any way to limit or restrict the implied authority arising from the contract of employment and the relationship of the parties. If the plaintiff in error had implied authority to endorse the check or draft arising out of his employment there was no forgery of the endorsement, no uttering or publishing of the forged endorsement, and no offense against the laws of the United States. We think the latter view is the correct one. The plaintiff in error was employed as an attorney to collect certain claims against the Government; he had undoubted authority to receive payment in cash or money, and having received instead a check payable to his clients, under the great weight of authority he had implied authority to endorse and cash the check. Thus, in re Brashear (D. C.) 275 Federal, 481, a dividend check was issued on the depository by a trustee in bankruptcy, countersigned by the referee, and made payable to the creditor, and it was held that an endorsement of the check by the attorney for the creditor in the name of the creditor constituted an acquittance by the creditor to the trustee in bankruptcy and to the depository. In Brown v. Grimes, 74 Ind. App., 655, 129 N. E., 483, the Court said: "It is a well established rule of law that an attorney who has a claim for collection has no [fol. 87] right in the absence of special authority to accept in settlement anything but money. This rule is made the law in this State by statutory enactment. Under this rule appellant's said attorney had no authority to receive the check as payment, nor could he by his endorsement impose a new contract liability upon appellant, who was his client; but, having taken the check in due course of his employment he had implied authority to make a formal endorsement in behalf of his client for the purpose of making the collection and receiving the money. Having by endorsement of the check received the money thereon, Underwood had by this means effected the purpose for which he had

been employed. He had collected, and had in his possession for appellant, the full amount of the judgment he had been employed to collect. We therefore hold that the acceptance and endorsement of the check by appellant's attorney, and the receipt by said attorney of the proceeds of such check, under the peculiar facts of this case, amounted to a payment of the judgment. The conclusion we have reached is in accordance with the great weight of authority"—citing many cases. Your Honor will note in that Bailey case, and I don't believe the facts of the Bailey case are any different from the facts here, that there Bailey appeared for the administrator of an estate that was entitled to some money from the Government. He got a check payable to the ad- [fol. 88] ministrator and he signed the administrator's name, signed his own name as attorney, and deposited the check in the bank, and there the Court held that such endorsement by the great weight of authority does not constitute forgery. The only reason I believe why Judge Burrows failed to dismiss the indictment upon that ground was because he preferred to have the matter threshed out upon the trial of the case. His attitude at the time was that he would dismiss the indictment upon that ground, and that was the ground that he considered first on that motion. Now, the defendant comes into court and says "Yes, I signed the name of Malcolm S. Mackay, and I signed my own name as attorney." That act appears to be the act of no person other than the defendant himself. There does not seem to be any question about that. That endorsement, the endorsement of Mackay, and the second endorsement of Prussian, show that it was his own act, and the Court has held, by the great weight of authority, that where it appears to be the act of the person himself it does not constitute forgery, and I say that the endorsement is conclusive of the fact that no forgery was committed. If this defendant is to be charged with anything he should be charged with the false assumption of authority when he has no such authority.

Mr. Henry: If what counsel says were true anybody could come along and forge the payee's name on the back of [fol. 89] a check and put some fictitious name under it, as attorney, and you could not prosecute him.

The Court: This Bailey case holds that an attorney has authority.

Mr. Henry: I am coming to that. I am taking up my opponent's first point. That was his point. He says because it appeared on the back of the check no crime was committed. If that is true anybody could get away with forgery and could not be prosecuted.

The Court: I don't think that there is anything to that.

Mr. Henry: On the second point that an attorney has ample authority to sign or endorse his client's name as payee on the reverse side of a draft or check I will refer your Honor to Corpus Juris, Volume I, Section 172, under the title "Attorney and Client". The author says in part "An attorney has no authority to endorse his client's name on negotiable paper unless his endorsement is a mere matter of form to enable him to effect the purpose for which he was employed by his client." We have no such facts here. I refer your Honor to Chatham vs. Hochstadter, 11 Daly, 343, in which Judge Daly held that where an attorney at law employed to collect a claim who received in payment thereof a check payable to his client's order, and who endorsed his client's name thereon by himself as attorney and deposited it to his own credit in his bank and drew the funds thereon, that such an endorse-[fol. 90] ment was without authority and fraudulent. "An attorney at law employed to collect a claim who receives in payment thereof a check payable to the order of his client has no authority to endorse it in his clients' name and cash it. The power to endorse checks and bills must be expressly given."

Filly vs. Gelman, 34 Supreme Court, 339. A case which is strikingly like the case at bar is Brown vs. People's National Bank, 170 Mich., 416. In that case it appears that one Robert Campbell, an attorney of Jackson, Michigan, by virtue of a retainer which his law firm had with the plaintiff Catherine Brown, received from the administrator of her father's estate a draft to her order. The draft was in the following words: "Washington, D. C., May 27, 1907. $608. Pay to the order of Catherine Schilling $608.37. Frederick Echelberger, Trust Officer. Thomas Parker, President of the Columbia National Bank, Washington, D. C."

Campbell endorsed the name of the payee, Catherine Brown, on the back, and put his own name Robert Camp-

bell underneath it, and cashed the check and appropriated the proceeds thereof.

In a suit brought by Catherine Brown (nee Schilling) against the bank it was held "That the endorsement of plaintiff's name on the draft was a careful imitation of her genuine signature and was a forgery", and it was further held that the bank which cashed the check upon such [fol. 91] forged endorsement would ordinarily have been liable but that on account of the plaintiff's laches in giving notice of the fraud to the bank after she discovered it an equitable estoppel arose. Now, it is a dangerous thing, I submit, to allow anyone to come along who may have authority to get possession of a check, and to allow him to endorse the payee's name on the reverse side of the check when he has no authority to do that very thing which he is charged with doing, and in this case I suppose this motion to dismiss is addressed to the evidence as well as to the indictment.

The Court: It is addressed to the evidence.

Mr. Henry: The evidence clearly shows that this man was particularly forbidden to cash the check or to endorse it, and yet in the face of that Prussian said he went and did it. How can it be said that he had ample authority to endorse his client's name on the back when he had positive authority that he can't do it and therefore we do not come within the meaning of this case which my opponent has cited to the Court.

Mr. Turk: I should like to answer my friend Mr. Henry. I call your Honor's attention to the two powers of attorney. The testimony of Mr. Miller was that the second power of attorney was not intended to limit the first. Your Honor will recall that I was very careful about that testimony. You will recall that I was careful in my question-[fol. 92] ing of Mr. Miller to bring out the fact that it was not intended to limit the powers conferred in the first power of attorney because Mr. Miller admitted that in the trial of the first case, and I wanted to make sure that he admitted it in this case. This first power of attorney gave him the right to do anything that Mackay would have done.

The Court: In this Bailey case it gives ample authority to an attorney to sign his client's name. How would you limit that authority if that is the general rule?

Mr. Turk: The power of attorney can be limited.

The Court: You have a written instrument which takes away from him the authority to endorse the check.

Mr. Turk: Standing alone, your Honor is right. But you have to take that second power of attorney in conjunction with the testimony of Mr. Miller that it was not intended for that instrument to limit the first power of attorney.

The Court: Then it would be a question of fact for the jury to pass on. In other words, if the jury should conclude that he did have authority, as I will instruct them, to sign his client's name, then it would not constitute forgery, but if he did not have authority either implied or express, then it would constitute forgery.

Mr. Turk: I can give your Honor a long line of cases.

The Court: A person would be absolutely at the mercy [fol. 93] of his lawyer if he could not restrict his authority to sign a check. It might subject the drawer of the check to additional liability because he would have to come in and familiarize himself with the authority given by the client to his attorney. Here there was an express power. On the back of this Government check it appears to me to limit the authority of anyone to sign the payee's name to it. I will overrule you. You demur to the evidence I take it?

Mr. Turk: Yes. I respectfully except. I move to dismiss on the ground that the evidence is insufficient to convict.

The Court: Denied.

Mr. Turk: I respectfully except.

Mr. Henry: There is no proof in this case that the defendant is an attorney at law.

The Court: You proceed with your case.

Mr. Turk: Does your Honor overrule my motion with respect to the second count of the indictment?

The Court: Yes, for this reason. I think the second count is sufficient in that it charges the defendant with uttering a forged instrument. That is the effect of the second charge. It is the uttering of a forged instrument, and it is not necessary to set out any such detail specifically as it would be in a case where a forgery is charged.

Mr. Turk: I think your Honor has overlooked this point. The second count of the indictment charges the defendant [fol. 94] with passing, uttering, and publishing to and upon one J. L. Buckman a certain forged obligation of the United States, to wit., a draft for the payment of money which was drawn by an authorized officer of the United States. In other words, they charge him with uttering a forged check drawn by an authorized officer of the United States.

The Court: My opinion is that the forgery there consisted in forging the endorsement.

Mr. Turk: They don't say so.

The Court: It would be a forged instrument if there was a forged endorsement.

Mr. Turk: They should say so, and there should not be a repugnant allegation. Mr. Henry said that the indictment in this case is different from the indictment in the De Lemos case, and I say it is identical. There is no difference between the two indictments, and in the De Lemos case it was held that the indictment was bad. There is no difference whatever between this second count and the indictment in the De Lemos case.

The Court: The demurrer will be overruled.

Mr. Turk: I respectfully except.

[fol. 95] Aaron Prussian, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct examination.

By Mr. Turk:

Q. What is your business?

A. Tax Counsellor.

Q. Are you admitted to practice in the Treasury Department of the United States?

A. Since 1921, yes, sir.

Q. Before what department are you authorized to practice?

A. The Internal Revenue Bureau, and the Board of Tax Appeals.

Q. Are you familiar with the requirements relating to admission to practice before the Internal Revenue Bureau and the Board of Tax Appeals? One need not be an attorney to practice before the Treasury Department, is that so?

A. No. One need only be familiar with the tax rules, and be familiar with general, and a graduate of a law school.

Q. Are you a graduate of any university?

A. Harvard.

Q. Did you take law?

A. Yes.

Q. There?

A. Yes.

Q. What year did you graduate?

A. 1912.

Q. Do you know Mr. Mackay?

A. I do.

Q. Mr. Malcolm Mackay?

A. Yes.

Q. Do you know Mr. Miller who testified this morning?

A. I do.

Q. Did you speak to Mr. Miller and Mr. Mackay with reference to retaining you to secure a refund of taxes paid by the Mackay Estates?

A. On several occasions, yes, sir.

Q. About when was the first time you spoke to either Mr. Miller or Mr. Mackay?

[fol. 96] A. Some time in the fall of 1924 I called with my former associate. I was at that time a member of the law firm of Kay & Kay in Washington. I called at the office of the attorney for the estate with regard to a certain refund that seemed to be coming to the estate from the records and file of the probate court where the estate was probated, and we heard nothing of the matter for about a month or two. Shall I continue and tell the story in my own words?

Q. Yes.

A. In November, 1925, I discontinued my association with Kay & Kay and entered upon practice in New York, as Kay & Kay had been former employees of the department in Washington, and were under charges by the——

Q. Never mind that.

A. In January, 1925, I called up Mr. Mackay and told him that unless the estate would pursue the refund claim prior to March 15th the Statute of Limitations would apply, and asked him whether he had authority. If I said Mr. Mackay I meant Mr. Miller. I said that unless he took the matter up with Mr. Mackay both myself and the estate would lose a profitable enterprise. He called me several times. About that time he was retiring from practice I believe, and he called me either from the office where he was retiring from or from the Union League Club where he lived, and finally told me to prepare the papers and he would submit them to Mr. Mackay. I mailed them to him in triplicate or quadruplicate, copies of the agreement retaining me in the matter of the refund due the Jennie Mackay Estate, and in the matter of the refund due Duncan Mackay Estate, and he told me over the telephone that he [fol. 97] would submit those to Mr. Mackay. About a week or two later I heard from him to the effect that I could come down there, and the papers would be executed. At that time I did not meet Mr. Mackay. When I received the papers from Mr. Miller they had been executed. I refer to the exhibits that were introduced here this morning, the agreements retaining me to act in the estates, and the power of attorney authorizing me to go ahead with the claim.

Q. I show you these papers marked Defendant's Exhibit A and B, and ask you whether these are the agreements under which you were retained to appear in both of these estates (hands papers to witness)?

A. Yes, sir. Those are the agreements under which I was retained to appear for the estates. May I make a further remark here?

Q. Yes.

A. As I prepared them the date was omitted, but the date inserted here *are* in Mr. Miller's handwriting.

Q. You prepared the claims for refund in both of these estates, did you not?

A. I did, sir.

Q. You prepared all the papers?

A. I prepared all the papers.

Q. Which of the refunds was first made by the Government?

A. The Duncan Mackay.

Q. Do you recall the amount of the refund?

A. I do not, sir. It was in the neighborhood—it was somewhere about $1,500.

Q. If Mr. Miller testified about $1,600 that testimony is substantially correct, is it not?

A. That is correct. You see in those days there were allowances of interest and sometimes the amount claimed was increased by $1,000 or so.

Q. Did you receive from Mr. Mackay or Mr. Miller the 15 per cent provided for in this retainer relative to the [fol. 98] Duncan Mackay Estate?

A. No, sir.

Q. Pardon me.

A. No, sir. Some time in April, some time in March or April, 1925, Mr. Mackay called at my office at 50 Church Street, and I believe, I well recall the incident, because he stumbled over a chair there, and was assisted to his feet by my stenographer. He told me he had received a letter from Kay & Kay, my former associates, who by that time had ascertained that I had secured that particular bit of business, and who had notified them that if any refund was secured they would hold them liable for any fee paid to me. I told Mr. Mackay at that time that I was the attorney in the case, and that he had retained me, and that any dispute between Kay & Kay and myself was to be adjusted between us. Furthermore I told him when, as, and if a refund were allowed I would be perfectly willing to give him a bond to protect him against any lawsuit that Kay & Kay might bring against him.

Q. You told Mr. Mackay that you would give him a bond to protect the Mackay Estate?

A. Yes.

Q. In the event of a suit against the estate?

A. Yes, but he told me he did not think that proposition would be acceptable.

Q. I show you this paper marked Government's Exhibit No. 1 and ask you whether it is a photostatic copy of the power of attorney which you filed in Washington authorizing you to represent the Mackay Estate (handing paper to witness)?

A. Yes; that is a copy of the power of attorney in the Jennie E. Mackay Estate.

Q. And that is signed by Malcolm Mackay as administrator?

A. Yes.

[fol. 99] Q. Pursuant to that power *at* attorney did you appear for the Mackay Estate in Washington?

A. Yes.

Q. You filed the necessary papers?

A. Yes.

Q. And prosecuted the claims for refund?

A. Yes.

Q. Until they were successfully completed?

A. Yes.

Q. I show you this paper marked Government's Exhibit No. 3 and ask you to tell us the circumstances surrounding that power of attorney?

A. At the time on April 5th or 4th when I notified the Mackay Estate through Mr. Miller that the Jennie Mackay check was on hand at Newark, and that we would have to have a statement from Mackay or some attorney to the effect that there was no income tax liability, I was under the impression that a copy of the power of attorney had been filed with the collector similar to the one that was filed in Washington. I found in going through my records and the correspondence which is on your desk—I don't know whether you introduced it or not, that when I first appeared before the Treasury Department they wrote back to me and told me that they had no record of a power of attorney. This power of attorney that they executed, this Exhibit No. 1, was executed in duplicate. I had no other copy in my files, and I thereupon filed with the Department a duplicate copy of the power of attorney. Consequently, when this question came up of presenting another power of attorney to the Collector I had no copy of the power of attorney that had been filed at Washington. I told my girl who was working for me to make a copy of the power of [fol. 100] attorney and send it to Mr. Mackay's office for execution. Instead of making a copy of the power of attorney she went to the Prentice Service, the Prentice Hall Service, and copied word for word with the necessary changes as to names a form in the Prentice Hall Service, and took it to Mr. Mackay's office. Mr. Miller was not in Mr. Mackay's office that day, April 6th. I had written to him in the Union League Club a day or two before, and

he had told me, that was on Tuesday, that he was going out of town, and he said he would not be back until Thursday. This power of attorney, I am not sure of the date, because it seems to have been changed to the 6th of April, was thereupon filed and the check secured. I did not even read the power of attorney.

Q. This power of attorney is dated April 6th, 1926?

A. Yes, sir.

Q. I show you this letter dated April 5th, 1926, and ask you whether you recognize the handwriting in that letter (handing paper to witness)?

A. Yes; that is the handwriting of John A. Miller, attorney for the estate of Mr. Mackay.

Q. Did you receive that letter by mail?

A. Yes, sir.

Q. From Mr. Miller?

A. I did.

Mr. Turk: I offer that letter in evidence.

The Court: Read that letter.

(The witness reads the letter to the jury.)

(The letter referred to was received in evidence and marked Defendant's Exhibit E.)

[fol. 101] Q. You say that at the time the second power of attorney was signed Mr. Miller was not present?

A. No, sir; he was not. He was in New Jersey or some other place.

Q. And if Mr. Miller says that he was present at the time he is mistaken?

A. He is simply mistaken. He came over and shook hands with me this morning, greeting me as Mr. Kay.

Q. Do you recall going to the office of the Collector of Internal Revenue in Newark and receiving that check for $9,044?

A. I did.

Q. Did you communicate with Mr. Miller immediately after securing that check?

A. Mr. Miller's brother is the secretary to Mr. Mackay. Immediately upon securing the check I telephoned his office, or maybe it was noon on April 7th to the effect that I had the check and would be glad to send the share that was due the estate.

Q. What did they say?

A. They wanted the whole check and would not discuss the matter with me.

Q. Will you give us the entire conversation? Will you give the conversation in your own way, tell us what conversation took place, so that we understand the situation as it really existed?

A. I returned to my office on April 7th at about eleven o'clock with the check issued to Mr. Mackay, and I called up Mr. Mackay. Mr. Miller's brother acted as secretary to Mr. Mackay, and I told him to tell Mr. Mackay that I had collected the check, and that I would be glad to deduct my fee in both estates and send them the difference. About two or three hours later I received a telephone call from the office of Mr. Mackay to the effect that that was not en- [fol. 102] tirely satisfactory and that they wanted the full amount of the check. I told them I had never received the $250 fee in the Duncan Mackay Estate. I felt quite hot about it. I did not think it safe to trust the estate for the $2,500 fee in the Jennie Mackay Estate, and I told them that until they were ready to make an adjustment for my fee and release me from any further obligation I could not see my way clear to give them the whole amount of the refund.

Q. The whole amount of the check?

A. The whole amount of the check.

Q. Do you remember any conversation with Mr. Miller to the effect that the check to be issued by the Government should be issued to you and Kay & Kay jointly?

A. That was even prior to the allowance of the claim, prior to my going to Washington and being sure that the claim would be allowed.

Q. They wanted to have the check made payable to you and Kay & Kay jointly?

A. Yes. I told them that would be absolutely unsatisfactory because Kay & Kay were then at the point of suing each other.

Q. At that time you were not associated with Kay & Kay?

A. No.

Q. When was that?

A. November, 1924.

Q. That was prior to the date on which you were retained?

A. Three months later. Subsequent to that Kay & Kay made independent efforts to get the business, and I made independent efforts. I secured it unfortunately.

Q. Was there ever anything said to you by Mr. Miller or by Mr. Mackay to the effect that they wanted you to adjust the differences which existed between Kay & Kay [fol. 103] and you before they would adjust the item of your fee?

A. Mr. Miller told me on three or four different occasions that unless I adjusted my differences with Kay & Kay he would not pay me my fee, that he had received a letter from Kay & Kay, and that they were undecided what to do about it, and that he considered the liability of the estate to both myself and Mr. Kay, and that he would make no payment to me.

Q. You have maintained right along, have you not, that you had a right to endorse this check?

A. I certainly have. I have been in this business for seven years and have had hundreds of refunds, and never had any case like this come up.

Q. Do you remember the occasion of Mr. Sullivan calling upon you?

A. Yes, sir.

Q. You voluntarily gave him all the information in the form of that statement?

A. I did. I had not pursued my investigation as to what the Mackay Estate people would do to settle the matter because for three or four months prior to that my office was practically closed.

Q. Did you tell Mr. Sullivan of the Secret Service that the only reason you had not sent the check to Mr. Miller or Mr. Mackay was because they refused to take anything less than the full amount?

A. I did.

Q. Do you recall the occasion of the visit to the Collector of Internal Revenue of Newark?

A. Yes.

Q. Who gave you the check in the Newark office?

A. A young lady whose duty it is to pass out refund checks. I do not recall her name.

[fol. 104] Q. Do you recall the gentleman from the Internal Revenue office who testified this morning?

A. I do.

Q. Mr. Wilson. Is that the name?

A. I do.

Q. Did he give you the check?

A. He did not.

Q. Was he present when you received it?

A. He was not.

Q. Who got the power of attorney?

A. He might have seen the power of attorney.

Q. Was that given to the girl?

A. That was given to the girl, yes. I remember quite distinctly that I gave the power of attorney to the girl.

Q. And she gave you the check?

A. She gave me the check. She may have brought that power of attorney in for him to look at it.

Q. But you did not personally give him the power of attorney, nor did he give you the check?

A. He did not. That is not his business.

Q. You signed Mr. Mackay's name on the back of this check, did you not?

A. I did.

Q. You do not deny that you signed it?

A. I signed it in Mr. Buckman's presence.

Q. And this signature Aaron Prussian, Attorney, followed by Aaron Prussian was written by you?

A. Correct.

Q. And all those three names were written in the presence of Mr. Buckman as he testified?

A. Yes, sir.

Q. And you say that you have had hundreds of cases like this with the Treasury Department?

A. Perhaps that is exaggerating. I should say between 150 and 200. No; it would be more than that. In the last seven years I have handled more than that. I had handled more than a dozen this year.

[fol. 105] Q. Where is the money, the proceeds of this check, less your fee?

A. Just at present it is on deposit at the office of Cohen & Harris, the attorneys for my brother for the last fifteen years.

Q. And they are authorized to pay out that money?

A. Yes.

Q. You insist, of course, on payment of your fee out of that amount?

A. Correct; I so indicated in my civil suit pending in this court for the last year.

Mr. Turk: I believe that is all.

Cross-examination.

By Mr. Henry:

Q. You are a graduate of Harvard Law School?

A. Yes.

Q. You studied law there for three years?

A. Yes.

Q. And you took the regular law course along with everybody else there?

A. Yes.

Q. That is a very thorough school, is it not?

A. At that time it was considered one of the best in the country.

Q. It still is, is it not?

A. I hope so.

Q. You are familiar then with law in general, are you not, from your training at Harvard?

A. As much as the average lawyer, I hope. I don't believe, I would not pretend to be familiar with as members of the United States Supreme Court or even the District Court.

Q. Do you remember the occasion when you first met Mr. Miller?

A. Not very clearly, but I think I do. Yes. I do.

Q. You are sure about that now? You remember it? Do you?

A. Yes.

[fol. 106] Q. Mr. Kay was there too, was he not?

A. (Witness hesitates) I believe so.

Q. And together you and Mr. Kay negotiated with Mr. Miller to go ahead with this tax refund?

A. We brought it to his attention at the time, but there were no negotiation, because he said he would have to look in the matter.

Q. You and Mr. Kay were up to his office?

A. Yes.

Q. You had found out, you had found that out from being down in Washington and watching the estate, have you not?

A. No, sir. By the way sir, may I inject a remark here?

That is rather a serious crime. Those Washington records are absolutely and strictly confidential. My source of information are the probate records in connection with the estate.

Q. When was that first meeting with Mr. Miller?

A. Some time in the fall of 1924.

Q. And you were then at that time associated with Kay & Kay, were you not?

A. Yes, sir.

Q. And soon after that you were given authority to go ahead and prosecute the claim?

A. No; five months after.

Q. You were still associated with Kay & Kay then, were you not?

A. No; my association with Kay & Kay ceased three months prior to the date of that power of attorney.

Q. When was the first meeting?

A. October.

Q. Of what year?

A. 1924.

Q. And you got the power of attorney——

A. Three or four months later or five months later, something like that.

Q. You were associated with Kay & Kay then, were you not?

A. No.

[fol. 107] Q. Do you remember testifying a few minutes ago that in November of 1925 you were still associated with Kay & Kay?

A. If I said November, 1925, it was wrong. It should be 1924.

Q. At any rate when you first started with Mr. Miller you were associated with Kay & Kay?

A. Yes.

Q. And you told Mr. Mackay so that day?

A. Yes. I also told everybody by sending cards in January 1925 when I discontinued my association with Kay & Kay.

Q. You knew that by sending a card Mr. Miller could not fire Kay & Kay, did you not?

A. He did not hire him.

Q. You knew that when you went there Kay was with you?

A. We were not hired then. We were told that it would be probably some time before he would let us know.

Q. How much money did you get from Mr. Buckman?

A. The difference between the amount of the check and about $2,100.

Q. In other words you got the sum of $7,000 from him?

A. Yes.

Q. And used that for your own purposes, did you not?

A. No, sir.

Q. You used part of it for your own purposes?

A. No, sir.

Q. None of it at all?

A. No.

Q. Did not Mr. Buckman apply some of it to the moneys that you owed him?

A. I just told him to deduct $2,100 which he applied on the mortgage.

Q. And the rest you did not turn over to Mr. Miller, did you?

A. I offered it to him.

Q. When?

A. On April 7th.

[fol. 108] Q. You mean the day after you cashed the check?

A. Yes.

Q. And when Mr. Miller says he did not know that you cashed the check until six months later he did not tell the truth?

A. I want you to understand that Mr. Miller's memory is rather faulty. By the way that offer was to his brother who was the secretary to Mr. Mackay.

Q. He did not hire you, did he?

A. His boss did.

Q. I thought you said that Mr. Miller hired you?

A. The power of attorney and the retainer was signed by Mr. Mackay. Mr. Miller was acting as Mr. Mackay's attorney, and not mine.

Q. You heard Mr. Miller say that he did not know anything about this check being delivered and the endorsement thereon until the following fall, and it was endorsed by you in the early part of April?

A. I did, and I just read a letter in which he acknowledges a letter of mine in which I told him I was going to get the check.

Q. Your letter did not say that you got the check, did it?

A. No, but he acknowledged my letter.

Q. Where is your letter?

A. It is in evidence or should be.

Q. You say that this second power of attorney that you got, Government's Exhibit 3, and which gives you full authority to receive the check but not to endorse the check in payment of refund and so forth, you took and went over to the office, the Internal Revenue office in Newark, and presented it, and got the draft?

A. I did.

Q. You did not see Mr. Miller that day, did you?

A. No.

[fol. 109] Q. And they did not give you the check before because you did not have the power of attorney?

A. Not because I did not have the power of attorney with me, but because the power of attorney that I thought was on file was not on file.

Q. And you got this power in the meantime and took it over?

A. To file it.

Q. You said that you never read that when Mr. Mackay signed it?

A. No.

Q. You took the trouble of going to New York and getting Mr. Mackay's signature to the document and you did not take the trouble to read the document, although you went all the way back to Jersey?

A. I did not testify to that.

Q. Did you read it?

A. I did not say that I went to Mr. Mackay's office to get the power of attorney. My girl drew it and took it over.

Q. But you went all the way over to Newark and did not read it?

A. I glanced at it myself.

Q. Did you look at it to see whether it was all right?

A. It is a copy of the usual power of attorney. It was only routine.

Q. And you say you did not read it when you went back to Newark?

A. I was not interested.

Q. You do not mean to say that you were going all the way over to Jersey to get the money, and that you took your authority with you without reading it?

A. Well, sir, I have been collecting these checks for a long time.

Q. Will you please answer the question? Did you go all the way to Jersey without knowing what the paper contained or not?

A. I do not recall whether I was over in New York or in Jersey.

Q. You were in New York, were you not? Did you not take this over to Jersey?

[fol. 110] A. I believe that the power of attorney was brought to me in Newark.

Q. Then you went to the Collector's office without knowing what you had?

A. I glanced at it, and found it was a power of attorney, and filed it.

Q. Do you mean to say that you who are a graduate of Harvard Law School did not take the trouble to read the document?

A. I did not read all of it.

Q. You understand legal documents. You are a graduate of Harvard?

A. Yes.

Q. And you did not read this one?

A. Not word for word.

Q. You know all about signing other peoples' names to checks, do you not?

A. Yes.

Q. And yet you did not look to see what authority you had?

A. I assumed that that was the same power of attorney I always had.

Q. You assumed all those things?

A. Yes.

Q. Even though you are a graduate of Harvard Law School?

A. I don't think you are fair in bringing Harvard into this.

Q. I have a right to, Mr. Prussian. Will you take Government's Exhibit No. 2 which I will now hand you and explain to the Court and the jury why you signed Malcolm S.

Mackay's name in small handwriting and why you signed your own name in big handwriting (handing paper to witness)?

A. Yes, sir; I will do that.

Q. Do that?

A. I believe if you will put Mr. Buckman on the stand he will corroborate this.

Q. Explain about the signature on that check?

A. Just a minute. You asked for an explanation and I will give it. I walked to my own home. I was at that time [fol. 111] the father of four children, two of which were twins eighteen months old. My wife *were* sick and the twins were on my lap, and I signed Malcolm S. Mackay. After I signed Malcolm S. Mackay my pen went dry and the nurse brought me another pen, and I signed Aaron Prussian, Attorney, and then Mr. Buckman said "You should sign Aaron Prussian again," which I did. I can't tell whether I signed one with my left hand or my right hand.

Q. And the reason that you give for signing Malcolm S. Mackay's name and the check in small handwriting was because you had the twins in your lap?

A. Yes.

Q. And that cramped your style?

A. That interfered with me. I can't say that it interfered with my style, my handwriting has always been wretched.

Q. You had seen Mr. Mackay's handwriting before, had you not?

A. Yes.

Q. You had seen these various powers of attorney?

A. Yes, but I had none in the file.

Q. But you had seen papers with his signature before?

A. Yes.

Q. And this cramped handwriting is not your usual style, is it?

A. Sometimes it is.

Q. You are a graduate from one of the best schools in the country. Just read on the back of it where you signed Mr. Mackay's name (handing paper to witness)?

A. "Form approved by the Comptroller of the Treasury."

Mr. Turk: Just a minute. May I see that part of the record before the witness reads it.

(Witness hands paper to Mr. Turk who reads it and hands it to the witness.)

[fol. 112] The Witness: "Form approved by the Comptroller of the Treasury January 27th, 1913. This check must be signed in ink or indelible pencil in line below by person in whose favor it is drawn, and must be signed exactly as it is on the face of the check. If the endorsement is made by an 'X' it must be witnessed by two persons who can write and who must give their places of residence underneath."

Q. It says it must be endorsed by the person in whose favor it is drawn?

A. Yes.

Q. And is that a little thing that you did not read in connection with this check?

A. I read that.

Q. And yet you signed somebody else's name on the back?

A. That is the Treasury regulation that it should be signed by the person in whose name it — made. I always understood that a rubber stamp endorsement was not good.

Q. But you signed somebody else's name anyhow? You signed somebody else's name after reading that notice?

A. I signed my client's name on it.

Q. Did you ever write to Mr. Miller telling him that you had obtained this check?

A. I don't recall, sir, I know I telephoned several times.

Q. Did you ever write telling him you had this check?

A. I don't recall. For three or four months my office was closed up.

Q. You did not see Mr. Miller when you obtained this check for a good many months, did you?

A. No, sir.

Q. And yet prior to the time that you got this check you kept in close communication with him, did you not?

[fol. 113] A. No, sir; about once in three or four months.

Q. Did not your lawyer ask Mr. Miller this morning whether you had not kept him informed of this case?

A. When anything happened I informed him.

Q. Except the cashing of this check?

A. I did advise him of the cashing of the check.

Q. But not the signing?

A. I did not inform him of the signing of anything. Most of the things came by telephone. Whenever I informed him anything where there were actual figures concerned he could not remember.

Q. Is it not a fact that after you were indicted over in the Southern District of New York that you offered to settle this case or tried to settle it?

A. No, sir.

Q. Did you no make some attempt to pay the Jennie E. Mackay Estate?

A. I continually made those both before and after I was under indictment.

Q. And the agreement on the part of the United States Attorney that the indictment would be quashed.

Mr. Turk: Just a moment. Your Honor ruled that out this morning. That was the conversation before Judge Goddard, I believe.

The Court: I do not think that it is material, but I have no objection to his making a statement. I understand that his contention is that he said he was ready to pay the money back, and that he offered to pay it back.

[fol. 114] Mr. Turk: If that is your Honor's ruling I will object to the form of the question.

Mr. Henry: I will withdraw the question.

Q. At the time that you were ready to pay this money back were you not under an indictment?

A. I was ready to pay the money back both before and after I was under indictment.

Q. But you did not make any attempt from April 6th to pay Mr. Miller anything at all for six or seven months afterwards, did you?

A. I have said half a dozen times this afternoon that I did.

Q. Not in writing?

A. Not in writing, nor was that power made in writing that you referred to. In fact prior to the time of the indictment we had round table conferences in Mr. Mackay's office with Mr. Miller when the terms of the proposed settlement were discussed.

Q. How many times did you communicate with Mr. Miller?

A. Three or four times.

Q. Was that right after you got this check?

A. What do you mean? I thought you meant throughout.

Q. How many times did you communicate with him after you got the check?

A. Three or four times.

Q. When was the first time?

A. The day after.

Q. How did you communicate with him?

A. By telephone.

Q. Did you tell him you had the check?

A. I did.

[fol. 115] Q. But you did not tell him that you had cashed it?

A. When I say Mr. Miller I refer to his brother.

Q. I am talking about this Mr. Miller. You never communicated with him after you got the check?

A. Just once.

Q. When was that?

A. Some time, I can't tell. Some time in the summer.

Q. This check was obtained and cashed in the spring, in April, early in April, was it not?

A. It was cashed early in April. His brother knew it, and I think within a week I closed my office up for several months.

Q. And you did not communicate with this Mr. Miller until the middle of the summer?

A. I did not communicate with anybody.

Q. Where was he when you communicated with him?

A. Either at the Union League Club or at the office of Mr. Mackay.

Q. And do you recall when it was? Was it in July, August, or in September?

A. I could not say.

Q. You- memory is somewhat hazy on that subject, is it?

A. I can't tell just when it was. I know that he communicated with my office, that my girl who was there had a talk over the telephone with him, and she told me she had a call from Mr. Miller. I believe that was the day before I buried my wife and I did not answer the communication.

Q. And the only communication you had with anybody at all after you had this check was verbal. You never wrote that to anybody?

A. Not that I recall.

Q. That is the only kind of communication that you had with them after you got this check. It was verbal, was [fol. 116] it not?

A. Yes, sir; I should say so.

Q. You did not send a bill for your services to anyone, did you?

A. I did not believe the bill would be paid.

Q. Did you send a bill to anybody for your services?

A. I never did.

Q. And you have never done so up to this time, have you?

A. No, sir.

Q. And you did not write and tell anybody that you collected the amount, and had the check in your custody, and upon receipt of the amount due to you would forward the check, did you?

A. Oh, yes. I wrote to my brother. I had deposited the money with him.

Q. But your brother did not write Mr. Mackay or Mr. Miller or have anything to do with them?

A. He reported to me the depository where that money was.

Q. But he was associated with you in that respect, was he not, and not with Mr. Mackay or Mr. Miller?

A. Yes.

Q. Have you ever been convicted of a crime?

A. No, sir.

Q. You jumped your bail over in the Southern District, did you not?

A. I did not.

Mr. Turk: I object to the form of that question.

The Court: He said he did not. He is bound by his answer.

Q. Was not your bail defaulted over there?

A. Due to the fact that my attorney failed to show up when he was supposed to. Not this attorney. The gentle- [fol. 117] man that represented me over there.

Q. It was due to the fact that you failed to show up was it not?

A. He did not notify me, and the minute I found out I appeared here and furnished——

Q. In the Southern District you did not appear voluntarily, did you?

A. Yes.

Q. Were you not arrested on a bench warrant?

A. Yes.

Q. That was three months after you were under indictment. You were under indictment and did not keep track of the case?

A. I paid my lawyer $1,200 to do that.

Q. But you did not show up on the return day?

A. No.

Q. And you were arrested on a bench warrant, were you not?

A. Yes.

Mr. Henry: That is all.

Redirect examination.

By Mr. Turk:

Q. You appeared whenever you were told to come back, did you not?

A. Yes.

Q. And you appeared here because you were notified that the case was on for trial, did you not?

A. I came 1,600 miles to do so.

Q. And you appeared here whenever it was necessary to appear for pleading, did you not?

A. Yes.

Q. And you appeared here whenever it was necessary to appear here, did you not?

A. I did.

Q. You referred to a Prentice Hall Service from which your stenographer made a copy of the power of attorney. [fol. 118] Will you explain to the jury what Prentice Hall Service is?

A. That is rather hard to explain to a jury of laymen unless they have some knowledge of taxes.

Q. The Prentice Hall Service are the rules prescribed for practicing before the Treasury Department and the decisions of the Treasury Department, are they not?

A. There are so many decisions, five or six hundred a day, that in order to keep in touch with them the Prentice Hall Service runs volumes of one to six hundred pages,

including new decisions coming up, and whenever any information is required one just has to go to the Prentice Hall Service, and it saves the trouble of going over 75 different volumes.

Q. I asked you that question because you testified that the young lady in your office went to the Prentice Hall Service and made a copy of the power of attorney.

A. One of the many forms.

Q. There are several forms of powers of attorney there, are there not?

A. There are a half a dozen. They do not recommend any particular form, nor does the Treasury Department prescribe any particular form.

Q. When you went to get that check at the Newark office Mr. Mackay knew you were going over to get it, did he not?

A. Certainly, sir.

Q. And Mr. Miller knew that the refund had been allowed by the Government, did he not?

A. Yes, but he did not know we were going to get it because he was out of town that day.

Q. But you informed him of the fact that a check was in the Newark office?

A. Yes, several days before.

Q. And you say that the only question between you and Mr. Miller, or between you and Mr. Mackay, was whether [fol. 119] you could deduct your fee first, or whether you were to send the full amount of the check and get your fee from them?

A. Correct. I was told flatly I would never get my fee from them I sent the check.

Q. Did Mr. Miller ever tell you why your fee was never paid in the Duncan Mackay estate?

A. No except that he told me that no fee would be paid.

Q. Did Mr. Mackay ever tell you why your fee was not paid in the Duncan Mackay Estate?

A. No.

Q. At the time you got the check in the Jennie E. Mackay Estate you had received no pay for services whatever in the Duncan Mackay Estate, had you?

A. No, sir.

Mr. Turk: That is all.

Recross-examination.

By Mr. Henry:

Q. You are familiar with the Prentice Hall powers of attorney?

A. Yes, some of them.

Q. You know there are several different forms of powers of attorney?

A. I don't know that.

Q. Did you not testify that the Prentice Hall Service had several forms of powers of attorney?

A. I referred to the fact that any particular form would be all right.

Q. Although you knew there were several different form- in the Prentice Hall books you did not bother to look at the form that your stenographer gave you?

A. I did not bother to do that.

Mr. Henry: That is all.

[fol. 120] By Mr. Turk:

Q. Was there ever any conversation between you and Mr. Mackay or between you and Mr. Miller with reference to the second power of attorney limiting the powers of your first power of attorney?

A. No.

Q. And you acted at all times under the powers given you under that first power of attorney filed at Washington?

A. That is the only one I ever went by.

Mr. Turk: That is all.

Mr. Henry: That is all.

Mr. Turk: That is the defendant's case.

Mr. Henry: I will recall Mr. Miller.

John E. Miller, recalled, having been previously sworn, testified as follows:

Direct examination.

By Mr. Henry:

Q. Can you state definitely whether or not Mr. Prussian communicated with you after April 6th, 1926?

A. He never communicated with me.

Q. And when did it first come to your attention that he had received this check and had cashed it?

A. By accident.

Q. Just tell us how you happened to find it out?

A. I was away most of the summer, and I received a letter from my brother stating——

Mr. Turk: I object to the contents of any letter from his brother.

[fol. 121] Q. Did you after receiving that letter make inquiry about the tax refund in the Jennie E. Mackay Estate?

A. Immediately upon my return in October I went to Newark and was informed——

Mr. Turk: I object to what he was informed.

Q. Did you inquire then about the tax refund?

A. Yes, what had become of the check.

Mr. Turk: I object to any conversation unless it was in the presence of the defendant.

The Court: Do not tell us what the conversation was.

Q. That is the inquiry you made over there?

Mr. Turk: I object to any inquiry that the witness might have had except in the presence of this defendant.

The Court: You will disregard the fact that he went over there and made an inquiry.

Q. You did not know that this check had been cashed until October, 1926?

A. I did not until October, 1926.

Q. Had you been in communication with your brother from time to time that summer?

A. Off and on.

Mr. Henry: That is all.

[fol. 122] Cross-examination.

By Mr. Turk:

Q. You testified this morning that you were present in your office on April 6th when that second power of attorney was signed by Mr. Mackay. Do you recall that

A. April 6th, 1926, I had no office, sir.

Q. You testified that you were present when Mr. Mackay signed the retainer on that day. Do you recall the testimony this morning?

A. That was in 1925.

Q. I am speaking of April 6th, 1926?

A. There was no retainer then, sir.

Q. I beg your pardon. I was referring to that second power of attorney?

A. Yes.

Q. You were present, were you?

A. Mr. Mackay referred it to me before he signed it.

Q. And you are sure that occurred on April 6th, 1926, the date fixed by that power of attorney?

A. The date of the acknowledgment.

Q. And you were present at that time?

A. Yes.

Q. Are you sure of that?

A. Certain.

Q. Pardon. What was your answer?

A. I was present.

Q. I asked you whether you were sure of that statement?

A. Yes.

Q. I show you this letter dated April 5th and ask you whether that letter is in your handwriting. (Handing paper to witness.) Is that your handwriting?

A. That is my handwriting.

Q. Did you send that letter to Mr. Prussian?

A. I sent it to Mr. Prussian.

Q. That paper is Exhibit E?

A. Yes.

Mr. Turk: That is all.

[fol. 123] By Mr. Henry:

Q. That letter was written on the 5th?

A. Yes.

Mr. Turk: That letter is marked Exhibit E, is it. Exhibit E or Exhibit 3? I don't know which.

Q. That was written on the 5th?

A. Yes.

Q. And you say the power was referred to you on the 6th.

A. I think so. Yes. Have you the power there?

Q. Yes.

A. Is that not acknowledged on the 6th?

Q. It is acknowledged on the 6th.

A. All right.

Mr. Henry: That is all. The Government rests.

Mr. Turk: May I for the purpose of the record renew my motion made at the close of the Government's case on the grounds then raised at that time, and upon the additional ground that the testimony clearly indicates that there was no intent on the part of this defendant to commit the crime of forgery.

The Court: I will deny that motion. I will sustain the motion to dismiss as to the second count, and I will leave to the jury just the question as to whether there was a forgery or not.

Mr. Turk: Exception. The defendant moves for a directed verdict.

The Court: That motion will be denied.

Mr. Turk: I respectfully except.

(Mr. Turk closed to the jury.)

(Mr. Henry closed to the jury.)

[fol. 124] CHARGE TO JURY

The Court charged the Jury as follows:

The COURT (MARTINEAU, J.):

Gentlemen of the Jury: This defendant is charged as you have been told with forging the name of the person in whose name the check for $9,044.37 was drawn by the Government. The specific charge is that he forged the name of Malcolm S. Mackay on the back of the draft which had been given to him by the Government. He admits that he signed the name. His defense is that he had authority, and that he honestly believed that he had authority to sign Mackay's name or endorse Mackay's name on the back of this check. That is the issue that you have to decide. The Court has dismissed the second count of the indictment,

so you will deal only with the first count which charges him with forgery by endorsing Mackay's name on the back of this check. Ordinarily if he was employed by Mackay to collect it, that would carry with it the authority to sign Mackay's name. The difficulty arose here on account of the second power of attorney which restricted his authority to the extent that he was authorized to receive it, but not to endorse the check. Now, the issue of fact that you have to decide is did he intentionally sign Mackay's name with the intent to defraud the Government. If that is true, he is guilty. If upon the other hand he signed it believing that he had the authority, only he was mistaken in that belief, then he would not be guilty, if he honestly signed it with that belief.

He starts with the presumption that he is innocent, and that presumption follows him throughout the trial, or until you are convinced from the testimony of his guilt be- [fol. 125] yond a reasonable doubt. Reasonable doubt is not any possible or imaginary doubt, because everything that depends upon human testimony is susceptible of some possible or imaginary doubt. It is a doubt that arises either from the testimony itself or from a lack of the testimony in the case.

The fact that an indictment is brought against him is not a circumstance that you are to consider in determining his guilt. It is simply a method. It raised no presumption of guilt. It is simply a method that the Government has of bringing these charges against these people who it believes to have committed a crime, so that that circumstance is not to be taken as one tending to show his guilt.

You are the sole judges of the credibility of the witnesses and the weight that should be given to their testimony. With that the Court has nothing to do. The Court instructs you as to the law and you determine the facts and return a verdict in accordance with the law and with the evidence.

In weighing the testimony of a witness you will take into consideration his demeanor upon the stand, his manner of testifying, the means of knowledge that he has about the facts about which he testifies, and the interest if any that he has in the case, the reasonableness of his testimony or its unreasonableness, and its consistency with itself or

with the other testimony in the case. Take into consideration any other fact or circumstance which will shed light on the truth or falsity of the witnesses' testimony.

You will take with you to the jury box your common sense, your reason, your judgment, in the light of your [fol. 126] experience in life. The purpose of submitting this testimony to you is to enable you to determine what the truth is with reference to this charge, and return a verdict in accordance with what you think that truth is.

The defendant has testified in his own behalf. He has a right to testify in his own behalf. You have no right to be captious or disregard his testimony. In weighing his testimony, however, you will apply to it the same test that you do in weighing the testimony of any other witness, remembering that he is vitally interested in the result of your verdict. A verdict of guilty would mean punishment. A verdict of acquittal would mean his freedom. If you think notwithstanding his interest in the case that he has testified truthfully you have the right to give that weight to his testimony. There has been testimony about his fee that he claimed he was entitled to in this case, and the fact that a dispute arose over the payment of that fee after he collected the money. If you believe that when he collected the money he collected it without any intention of defrauding the Government, then he is not guilty of a crime. There was a dispute he says between him and his client over the payment of his fee. If you believe that that is source of this trouble, and of this indictment, and that he did not at the time he signed Mackay's name, endorsed Mackay's name upon the check, intend to defraud the Government then he would not be guilty of a crime. In other words, there must be an intent to defraud the Government at the time he endorsed the check. The fact that subsequently a dispute arose between him and his client is not material [fol. 127] except that it might be taken into consideration to show what his intent was when he signed Mackay's name on the draft. Is there anything else?

DEFENDANT'S REQUESTS TO CHARGE

Mr. Turk: I have two requests. I ask your Honor to charge the jury with respect to this statement in the first

count of the indictment that thereafter the defendant unlawfully, wilfully, knowingly, and feloniously obtained possession of said draft.

The Court: What do you want me to charge?

Mr. Turk: I ask your Honor to charge the jury that the Government has utterly failed to prove the allegations made in that respect.

The Court: That request will be denied.

Mr. Turk: I respectfully except. I ask your Honor to charge the jury that in determining whether the defendant acted honestly in endorsing Mackay's name on the back of that check the jury must consider the testimony of Mr. Miller, the attorney, to the effect, that the second power of attorney was not intended to limit the power given by Mr. Mackay to Mr. Prussian under the first power of attorney, but simply to permit Prussian to get the check from the Newark office.

The Court: I think I have covered that instruction. You will take circumstance and that testimony into consideration in determining the intent with which the defendant acted. Take into consideration all the testimony that is offered here in determining his guilt or innocence. If after you have considered all of the testimony you have a reasonable doubt as to his guilt then you are to acquit him. If upon the other hand you have no reasonable doubt as to his guilt you are to convict him.

[fol. 128] Mr. Turk: My last request is that your Honor charge the jury that if they believe the testimony of Mr. Miller to the effect that the second power at attorney was not intended to limit the first power of attorney they must acquit.

The Court: That will be refused. Those instructions are for you to consider along with all the other testimony.

Mr. Turk: I respectfully except. Will your Honor advise the jury that they are not to consider any refusal on any proposition of law, and that that is a matter for the Court.

The Court: You have nothing to do with the law in the case. The Court instructs you as to what the law is, and you are to return your verdict both in accordance with the law and with the facts as you find them.

VERDICT

(The jury retired at five fifteen o'clock P. M. and returned at five thirty with a verdict of guilty against the defendant.)

Mr. Berg: I ask for an adjournment until tomorrow morning for the purpose of making the necessary motions.

Mr. Henry: No objection.

Mr. Berg: Will your Honor continue the defendant under the same bail?

The Court: He could not be continued under the same bond.

Mr. Berg: Will you parole him in my custody?

The Court: It is not customary to do that.

Mr. Berg: It is customary in the Southern District of New York. I can't see what objection there will be to that. [fol. 129] The man is perfectly responsible. He lives in Detroit and he came here especially for this trial. I think we can assure your Honor that it is perfectly safe.

The Court: I think he will have to remain in custody.

Mr. Berg: Will your Honor give us until tomorrow morning to prepare the motions?

The Court: Yes; I will do that.

(Whereupon an adjournment was taken until August 7th, 1929, at ten thirty o'clock A. M.)

August 7th, 1929—10:30 A. M.

Met pursuant to adjournment.

Present: The Court, Mr. Henry, Mr. Turk, Mr. Berg.

MOTION TO SET ASIDE VERDICT

Mr. Berg: The defendant moves to set aside the verdict on the ground that it is against the evidence, against the weight of evidence, and against the law, and on all the exceptions taken during the course of the trial. The defendant also moves for an arrest of judgment on the ground that the indictment does not state a crime under the laws of the United States.

The Court: Motions denied.

Mr. Berg: I respectfully except.

The Court: The sentence of the Court will be $200 fine and five years in the penitentiary.

[fol. 130] GOVERNMENT'S EXHIBIT 1

United States of America, Treasury Department, Washington

[SEAL.]

January 5, 1929.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed is a true copy of the Power of Attorney executed February 27, 1925, by Malcolm S. Mackay, Administrator, Estate of Jennie E. Mackay the originals of which are on file in this Department.

In witness whereof I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary:

(Signed) F. A. Birgfeld, F. A. Birgfeld, Chief Clerk, Treasury Department. (Treasury Department Seal.)

M J.

[fol. 131] No Rec.—I N J. U R.
Rec'd Aug 7 1919. 5 N J. 1 b.

Power of Attorney

To the Commissioner of Internal Revenue, Washington, D. C., and to the Collector of Internal Revenue, Newark, N. J.:

I, Malcolm S. Mackay, Administrator C.T.A. of the Estate of Jennie E. Mackay, have made constituted and appointed, and by these presents do make, constitute and appoint, Mr. Aaron Prussian, of #50 Church Street, New York City, duly registered as an approved agent entitled

to practice before the Treasury Department pursuant to Treasury Department Circular No. 230, my true and lawful attorney for me and in my name place and stead, to represent me and act for me in connection with all matters in any way relating to the Federal Income Tax return filed by me on behalf of said Estate covering the 1919 income tax liability of said Estate, and in particular, to represent me and act for me in prosecuting a claim for refund of a portion or all of said income taxes; giving and granting unto my said attorney, full power and authority to do and perform all and everything requisite and necessary to be done in and about the premises as fully, to all intents and purposes, as I might or could do if personally present, also [fol. 132] empowering him to receive all official communications, and granting him full power of substitution and revocation, hereby ratifying and confirming all that my said attorney, Mr. Aaron Prussian shall lawfully do or cause to be done by virtue hereof.

In witness whereof, I have hereunto set my hand and seal the 27th day of February, 1925.

Malcolm S. Mackay, Administrator C.T.A. Estate of Jennie E. Mackay. L.B. (L.S.)

(Documentary Stamp.) /C.

State of New York,
County of New York, ss:

On the 27 day of February, nineteen hundred and twenty-five, before me came Malcolm S. Mackay, as administrator C. T. A. of the Estate of Jennie E. Mackay, deceased, to me known to be the individual described in, and who executed, the foregoing instrument, and acknowledged that he executed the same.

Edwin E. Leonhard, Notary Public, Westchester County. Certificate filed in New York County, No. 200, Reg. No. 6204. Commission expires March 30, 1926. (Notarial Seal.)

[fol. 133] GOVERNMENT'S EXHIBIT 2

12-1

"Treasury, Washington, D. C. 784427

Mar. 19, 1926.

Treasurer of the United States

15-51

[SEAL.]

Pay to the order of Malcolm S. Mackay, admr. est. of Jennie E. Mackay, $9,044.37, nine thousand forty-four 37/100 dollars.

Object for which drawn: Refunding taxes illegally collected.

N. P. 1-387. 14342.

J. L. Summer, Disbursing Clerk.

[Endorsements:] Form approved by Comptroller of the Treasury January 27, 1913. This check must be indorsed in ink or indelible pencil on the line below by the person in whose favor it is drawn and the name must be spelled exactely the same as it is on the face of the check. If in- [fol. 134] dorsement is made by mark (X) it must be witnessed by two persons who can write, giving their place of residence in full. (Sign on this line) Malcolm S. Mackay, Admr. Est. of Jennie E. Mackay. Aaron Prussian, Atty. Aaron Prussian. Pay to the order of Bank of Coney Island. J. L. Buckman. [Stamps.] Received payment from the Treasurer of the United States Apr. 8, 1926. 1-120. Federal Reserve Bank of New York. 1-120. Bank of Coney Island S. C. PR. Apr. 7, 1926. P. T., Brooklyn, N. Y. Pay to the order of Federal Reserve Bank of N. Y. Apr. 7, 1926. Bank of Coney Island, Coney Island, N. Y. C. N. J. Macdonald, Cashier. 1-387.

[fol. 135] GOVERNMENT'S EXHIBIT 3

5th Dist. N. J., Collr. Int. Rev., April 6, 1926, Income Tax Div.

Power of Attorney

To the Collector of Internal Revenue, Newark, N. J.:

I, Malcolm S. Mackay (by virtue of letters of administration issued to me as administrator c. t. a. of the estate

of Jennie E. Mackay, Bergen County, N. J.) have made, constituted, and appointed, and by these presents do make, constitute, and appoint, Mr. Aaron Prussian of 50 Church Street, New York City, duly registered as an approved agent entitled to practice before the Treasury Department pursuant to Treasury Department's circular # 230 my true and lawful attorney for me and in my name, place, and stead, to represent me and act for me in connection with all matters in any way relating or pertaining to the income tax return of the estate of Jennie E. Mackay for the year 1918 and in particular in the prosecution of a claim for refund of income taxes paid on account of 1918 income tax liability, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing requisite and necessary to be done in and about the premises and fully to all intents and purposes and I might or could do if personally present.

[fol. 136] Also empowering him to receive and sign all official communications.

Also empowering him and giving him full authority to receive but not to endorse checks in payment or refund in connection with the aforesaid matter, and granting unto him full power of substitution and revocation, hereby ratifying and confirming all that my said attorney, Mr. Aaron Prussian, shall lawfully do or cause to be done by virtue hereof.

In witness whereof, I have hereunto set my hand and seal this Sixth day of Apr. A. D. 1926.

Malcolm S. Mackay. (L.S.)

Sworn to before me this 6th day of Apr., A. D. 1926. Edwin E. Leonard, Notary Public, Westchester Co. Certificate filed in New York County No. 800, Reg. No. 6401. (Seal Edwin E. Leonard, Notary Public, Westchester County.)

[fol. 137] GOVERNMENT'S EXHIBIT 4

Mr. John L. Sullivan, of the U. S. Secret Service, Custom House, New York.

DEAR SIR: The facts concerning the collection of refunds in re Jennie E. Mackay Estate are as follows:

I was retained to obtain the refunds in the Duncan Mackay, as well as the Jennie E. Mackay estates. My employment in connection with the refunds in the two estates mentioned above was followed by written retainers duly executed by Malcolm S. Mackay, administrator in both estates.

In due time and as a result of my professional efforts the refunds were allowed in both estates, and the administrator actually received checks from the Treasury Department. Mr. John E. Miller, the attorney with whom I had my dealings in connection therewith, informed me that he could not comply with the terms of my retainer covering both estates on the ground that Kay & Kay, a firm of Washington attorneys, had filed a claim with him, claiming a share of the said refunds. Thereupon, John E. Miller, the attorney, advised me that he would not pay me for the services rendered in connection with the two estates mentioned above until I had composed my differences, if any, with Messrs. Kay and Kay. So far as Kay and Kay are concerned, the matter has never been adjusted.

During the existence of this dispute between John E. Miller and myself, I, in due course, obtained a refund of [fol. 138] $9224.37. I, thereupon, informed Mr. John E. Miller or Mr. Mackay's office, that I had received the check for said refund and suggested to him that I wanted my fees paid in connection with all the refund matters that I was handling for him as attorney. These matters have never been adjusted and are still pending. Under the terms of my retainer and power of attorney, I contend that I was justified in withholding and using the said check until the other disputes between Mr. John E. Miller and myself had been adjusted.

Jan. 6, 1927.

Aaron Prussian.

[fol. 139] DEFENDANT'S EXHIBIT A

Agreement

In consideration of services rendered or to be rendered by Aaron Prussian, Counsellor on Federal Taxation of New York, New York, in the prosecution of my claim for refund and/or abatement of taxes paid to the United States upon the estate of or by the Estate of Jennie E. Mackay

under the Revenue Act of September 8, 1916, as amended by the Act of March 3, 1917, or the Act of October 3, 1917, or the Act of 1918, or the Act of 1921, or the Act of 1924, I hereby agree to pay to the said Aaron Prussian a fee equal to twenty-five per cent of the amount which may be recovered in the settlement of said claim, and it is further understood that I shall not be liable for or chargeable with any disbursements or expenses incident to the prosecution of said claim.

Dated at New York City, N. Y., February 27th, 1925.

(Sgd.) Malcolm S. Mackay, Administrator C. T. A. Estate of Jennie E. Mackay.

[fol. 140] DEFENDANT'S EXHIBIT B

Agreement

In consideration of services rendered or to be rendered by Aaron Prussian, Counsellor on Federal Taxation of New York, New York, in the prosecution of my claim for refund and/or abatement of taxes paid to the United States upon the estate of or by the Estate of Duncan Mackay under the Revenue Act of September 8, 1916, as amended by the Act of March 3, 1917, or the Act of October 3, 1917, or the Act of 1918, or the Act of 1921, or the Act of 1924, I hereby agree to pay to the said Aaron Prussian a fee equal to fifteen per cent of the amount which may be recovered in the settlement of said claim, and it is further understood that I shall not be liable for or chargeable with any disbursements or expenses incident to the prosecution of said claim.

Dated at New York City, N. Y., Feb. 27, 1925.

Malcolm S. Mackay, Administrator Estate of Duncan Mackay.

[fol. 141] DEFENDANT'S EXHIBIT C

Telephone: Cortlandt 0729.

Aaron Prussian, Counsellor on Federal Taxation, 50 Church Street, New York

January 22, 1926.

Mr. Malcolm S. Mackay, administrator Estate of Jennie E. Mackay, c/o Mackay & Company, 14 Wall Street, New York.

Re Settlement of Refund of 1919 Income Taxes Estate of of Jennie E. Mackay, Schedule It—A—15493

DEAR SIR: You are advised that interest in the amount of $2,247.83 has been determined by the Treasury Department in the above matter. The refund allowed was $6,976.54. The total recovery will accordingly be $9,224.37.

You are further advised that the appropriation for the refunding of income taxes erroneously or illegally collected is exhausted: therefore, the issuance of checks in settlement of refunds cannot be resumed by the Department until Congress makes further appropriations for this purpose.

Yours very truly, Aaron Prussian.

Copy to Mr. John E. Miller.

[fol. 142] DEFENDANT'S EXHIBIT D

Telephone: Cortlandt 0729.
Dict. 4/1/26.

Aaron Prussian, Counsellor on Federal Taxation, 50 Church Street, New York

April 2nd, 1926.

John E. Miller, Esq., Union League Club, 1 East 39th St., New York, N. Y.

DEAR SIR: The Collector of Internal Revenue at Newark, has sent to Mr. Malcolm S. Mackay, Administrator of the Estate of Jennie E. Mackay, the usual routine statement (which is now required to be made by each tax payer to

whom a refund is made) as to there being no outstanding income tax liabilities on the part of tax paying estate.

Of course there are none.

The refund check is in the Collector's Office in Newark, awaiting issue by the Collector upon receipt back by him of the statement to be signed by Mr. Mackay.

Upon telephoning Mr. Mackay's office a few days ago and talking to your brother there, I was informed that Mr. Mackay is at present in the West.

[fol. 143] Pease advise me whether he is expected to return shortly, or whether it will be better to ask his office to forward the blank for execution by Mr. Mackay at his out of town address.

Very truly yours, Aaron Prussian.

AP'M.

DEFENDANT'S EXHIBIT E

One East Thirty-ninth Street,
New York, April 5, 1926.

DEAR SIR: In reply to your of the 2nd would say, that Mr. Mackay is expected at his office today.

I am going out of the City this afternoon, and be back on Thursday for the day.

Yours truly, John E. Miller.

Aaron Prussian, Esq.

[fol. 144] STIPULATIONS BETWEEN ATTORNEYS AS TO CORRECTNESS OF BILL OF EXCEPTIONS

It is hereby stipulated and agreed by and between the parties that the foregoing bill of exceptions is correct in every particular and that it may be duly signed, settled and allowed by the Hon. John E. Martineau, one of the judges of this Court.

Dated Feb'y. 7, 1930.

Howard W. Ameli, Attorney for the Plaintiff. Harold L. Turk, Attorney for the Defendant-Appellant, Aaron Prussian.

In United States District Court

Order Settling Bill of Exceptions

This is to certify that the foregoing bill of exceptions tendered by the defendant is correct in every particular and it is hereby settled and allowed and made a part of the record in this case.

Dated —— —, ——.

John E. Martineau, U. S. D. J.

[fol. 145] In United States District Court

[Title omitted]

Order Extending Time to File Return—Jan. 14, 1930

On reading and filing the annexed affidavit of Samuel Rosenwein, verified the 13th day of January, 1930 and on the stipulation dated the 13th day of January and upon all the papers and proceedings heretofore had herein, it is hereby

Ordered that the time for the defendant, Aaron Prussian, to file his Transcript of Record on appeal and bill of exceptions be and the same hereby is extended to the 15th day of February, 1930; and it is further

Ordered that the August 1929 term of this court be and the same hereby is extended to the 15th day of February, 1930.

Enter.

R. A. Inch, U. S. D. J.

[fol. 146] In United States District Court

Stipulation as to Record

It is hereby stipulated and agreed by and between the parties that the foregoing is a copy of the transcript of rec-

ord of the said District Court on the above entitled matter as agreed on by the parties.

Dated February 7, 1930.

Howard W. Ameli, Attorney for Plaintiff. Harold L. Turk, Attorney for Defendant-Appellant, Aaron Prussian.

In United States District Court

Order as to Record

Upon the above stipulation, it is

Ordered that the foregoing printed record be filed for use by the Clerk of this Court in lieu of the original papers in certifying a record on appeal.

Dated —— —, ——.

John E. Martineau, U. S. D. J.

[fol. 147] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 148] In United States Circuit Court of Appeals for the Second Circuit

United States of America, Plaintiff-Appellee,

against

Aaron Prussian, Defendant-Appellant

Before Manton, A. N. Hand, and Chase, Circuit Judges

Appeal from the District Court for the Eastern District of New York. Defendant was indicated on two counts for violation of Title 18, U. S. Code, § 262 (U. S. C. C. § 148) and convicted on one count. He appeals. Judgment of conviction affirmed.

Harold L. Turk, Esq., Attorney for Appellant. S. Rosenwein, Esq., of Counsel.

Howard W. Ameli, Esq., United States Attorney, Attorney for Appellee. Herbert H. Kellogg, Esq., Emanuel Bublock, Esq., Assist. U. S. Attorneys, of Counsel.

OPINION

MAXTON, Circuit Judge:

Appellant, an attorney at law, was convicted below for falsely forging by endorsement, the payee's name on a draft of the United States giving a refund of income taxes. (Title 18, U. S. Code, § 262; U. S. C. C. § 148.) He was employed to obtain a refund of taxes for the estate of Jennie E. Mackay. His power of attorney dated February [fol. 149] 27, 1925, authorized him to represent his client and act for him—

"in connection with all matters in any way relating to the Federal Income Tax return filed by me on behalf of said Estate, covering the 1919 income tax liability of said Estate, and in particular, to represent me and act for me in prosecuting a claim for refund of a portion or all of said income taxes; giving and granting unto my said attorney, full power and authority to do and perform all and everything requisite and necessary to be done in and about the premises as fully, to all intents and purposes, as I might or could do if personally present, also empowering him to receive all official communications, and granting him full power of substitution and revocation * * *."

The government granted a refund for $9,044.37 but before delivering the check to the appellant, the government required another power of attorney. It was dated April 6, 1926 and authorized him—

"to represent me and act for me in connection with all matters in any way relating or pertaining to the income tax return of the estate of Jennie E. Mackay for the year 1918 and in particular in the prosecution of a claim for refund of income taxes paid on account of 1918 income tax liability, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing requisite and necessary to be done in and about the premises and fully to all intents and purposes and (sic) might or could do if personally present.

Also empowering him to receive and sign all official communications.

[fol. 150] *Also empowering him and giving him full authority to receive but not to endorse checks in payment of refund in connection with the aforesaid matter * * *.*" (Italics ours.)

The appellant concedes that he received the draft and endorsed on the back thereof: Malcolm S. Mackay (written in fine close hand) Admr. Est. of Jessie E. Mackay (typewritten) Aaron Prussian, Attorney (flowing large hand) Aaron Prussian (flowing large hand). There was also written: Pay to the Order of Bank of Coney Island, J. L. Buckman. Buckman cashed the check for appellant, retaining sufficient to pay a mortgage on appellant's home; and gave the balance to Prussian, a sum stated to be between five and six thousand dollars. It was agreed that the appellant had a 15% contingent retainer to be collected out of the sum refunded.

The defense claimed was that the appellant acted in good faith, believing he had authority to endorse the check and retain his fees and then intended to remit the difference to the estate. But there was evidence given by the attorney for the estate, that he first found out that appellant had endorsed the check about six months after it had been cashed, and during that time he had no communication from appellant and learned of the cashing of the check by chance only. When the appellant was apprehended and questioned by a Secret Service agent of the Government, he offered to make restitution to the government of the amount due, but failed to do so. Whereupon, after a delay of upwards of two weeks, the prosecution was instituted. He never did make restitution to his client.

The statute (U. S. Code, Title 18, § 261; U. S. C. § 147) provides that an obligation or other security of the United [fol. 151] States shall be held to mean a check or draft for money drawn by or upon authorized officers of the United States which have been or may be issued under any act of Congress, U. S. Code, Title 18, § 262 (U. S. C. C. § 148) makes it a criminal offense for one with intent to defraud, to falsely forge, counterfeit or alter an obligation or other

security of the United States. The indictment charged an offense under § 262, Title 18, U. S. Code (U. S. C. C. § 148), pleading the endorsement of the draft by forging the name of the payee, and "that the said draft for money with the said forged endorsement thereon did together constitute a forged obligation of the United States as the defendant then and there well knew, with intent then and there and thereby to defraud". This was sufficient. Hamil vs. United States, 298 Fed. 369 (C. C. A. 5); Alvarado vs. United States, 9 Fed. [2] 385 (C. C. A. 9); United States vs. Jolly, 37 Fed. 108 (D. C. Tenn.) This draft to pay money was an obligation of the United States (Neall vs. United States, 118 Fed. 699 [C. C. A. 9]) and forging the endorsement is punishable under § 148 of the Criminal Code (U. S. Code, § 262). Hamil vs. United States, supra; Alvarado vs. United States, supra.

The endorsement was without authority. The second power of attorney expressly prohibited such endorsement and it is of no importance that the first was more general or did not prohibit in express words such endorsement. Bailey vs. United States, 13 Fed. (2d) 325 (C. C. A. 9) is relied upon by the appellant, but it is distinguishable. There it was held there was no testimony showing that the defendant's authority was in any way specifically restricted under his general authority as attorney at law retained to [fols. 152 & 153] collect a claim. He had authority to receive cash in payment of the claim and he had the implied authority to endorse and cash the check. At bar, there was a studied effort to imitate Malcolm S. Mackay's handwriting, as a comparison of this with his own admitted handwriting shows. Malcolm S. Mackay's name was signed in a small regular handwriting and appellant's name was signed in a large flowing handwriting, showing his habitual signature. It points out by these different signatures, an effort to deceive. To be sure, the appellant made explanation as to this but the jury apparently decided against it.

The court permitted the jury to pass upon the alleged authority, express or implied, to endorse the draft and also whether or not the appellant in good faith believed that he had such authority. The court charged the jury that ordinarily if appellant was employed to collect the draft, that carried with it the authority to sign Mackay's name, but pointed out that the difficulty arose because of the second

power of attorney which restricted his authority to endorse, and while he was authorized to receive it, he endorsed the check. He left it to the jury to say whether or not the appellant intentionally forged the name with intent to defraud the government. This was as favorable to the appellant's case as he could have expected. We cannot reverse the finding of want of authority to make the endorsement. Felder vs. United States, 9 Fed. (2d) 872 (C. C. A. 2); Looker vs. United States, 240 Fed. 932 (C. C. A. 2); Fraina vs. United States, 255 Fed. 28 (C. C. A. 2).

Judgment of conviction affirmed

[fol. 154] In United States Circuit Court of Appeals, Second Circuit

United States, Plaintiff-Appellee,

v.

Aaron Prussian, Defendant-Appellant

Appeal from the District Court of the United States for the Eastern District of New York

Judgment—Filed July 7, 1930

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be, and it hereby is, affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[File endorsement omitted.]

[fol. 155] Clerk certificate to foregoing transcript omitted in printing.

[fol. 156] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, the briefs and argument to be limited to the question whether the indictment states an offense under the criminal code.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 35,370. U. S. Circuit Court of Appeals, Second Circuit. Term No. 448. Aaron Prussian, petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed September 11, 1930. File No. 35,370.

FILE COPY

SEP 11 1930

Supreme Court of the United States.

OCTOBER TERM—1930.

No. 448

AARON PRUSSIAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HAROLD L. TURK,
Counsel for Petitioner.

SAMUEL ROSENWEIN,
WALTER B. MILKMAN,
Of Counsel.

THE COURT PRESS—Law Printers—17 West Street—Bowling Green 2820-1-4

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Supreme Court of the United States

OCTOBER TERM—1930.

No.

AARON PRUSSIAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI.

May it please the Court:

The petition of Aaron Prussian respectfully shows to this Honorable Court:

Summary Statement of the Matter Involved.

The petitioner was convicted in the United States District Court for the Eastern District of New York for falsely forging an endorsement upon a genuine government draft. The draft was in payment of certain income tax refunds due to the estate of Jennie E. Mackay obtained by the petitioner as the attorney for the administrator, Malcolm S. Mackay. The petitioner was charged with a violation of Title 18, United States Code, Section 262, 148 U. S. C. C. (R. 9). Upon conviction, the Court sentenced the petitioner to five years in the penitentiary and Two hundred ($200) Dollars fine (R. 129). An appeal was prosecuted to the Circuit Court of Appeals of the Second Circuit and the judgment

of conviction affirmed by that Court on the 30th day of June, 1930.

The facts in the case are not complicated nor are they in dispute. The petitioner, Aaron Prussian, a graduate of Harvard University Law School in 1912, was admitted to practice in the Treasury Department of the United States as tax counsellor in the year 1921 (R. 95). In the Fall of 1924, the petitioner was a member of the law firm of Kay & Kay in Washington. With one Kay, he called at the office of John E. Miller, attorney for Malcolm S. Mackay, who was the administrator of the estates of Jennie E. Mackay and Duncan Mackay, and informed Miller that the Mackay estate had a claim against the Government for overpayment of taxes and that certain refunds could be obtained (R. 21, 96). Miller told them that he would inquire into the merit of the matter. In January, 1925, Prussian discontinued his association with Kay & Kay (R. 107) and at the same time informed Miller that the Statute of Limitations would soon bar the refund claim belonging to the estate (R. 96). Miller finally told the defendant to prepare all the papers and he would submit them to Mr. Mackay. There is no dispute and it is conceded that Malcolm S. Mackay, the administrator, authorized Miller to employ Prussian to present the matter to the Government (R. 66).

The written retainers duly signed and executed by Malcolm S. Mackay, as administrator, on February 27th, 1925, provided for the employment of Prussian to obtain refunds of taxes in both the Jennie E. Mackay and Duncan Mackay estates (R. 139, 140). On the same day, the defendant received from Mackay a general power of attorney (R. 131), which power was filed in Washington by Prussian and pursuant to such power he appeared

for the Mackay estate (R. 28, 99). The first refund obtained by Prussian was in the Duncan Mackay estate amounting to about Sixteen hundred ($1600) Dollars (R. 99). The draft of that sum was sent directly to Mr. Mackay (R. 30). Prussian was never paid his fee in that case, although he had prosecuted the claim successfully, because, as Miller claimed, the firm of Kay & Kay had notified Miller that in the event of the payment of the fee to Mr. Prussian, they would hold Mackay liable on a *quantum meruit* for services rendered (R. 38, 98). Despite Prussian's offer to give Mackay a bond to protect him against any lawsuit by Kay & Kay, the defendant never received his fee in the Duncan Mackay estate (R. 30).

In January, 1926, Prussian informed Mackay that a refund had been allowed in the Jennie E. Mackay estate and that the total recovery would be Nine thousand two hundred twenty-four and 37/100 ($9,224.37) Dollars (R. 141). On April 2nd, 1926, Prussian informed Miller that the refund check was in the office of the Collector of Internal Revenue in Newark awaiting issuance upon receipt back by Mackay of a statement that there were no outstanding income tax liabilities on the part of the estate (R. 142). Thereafter on the 6th day of April, 1926, the defendant called at the office of the Collector in Newark and inquired about the check. He was told that the draft was in the office but that it could not be released unless a power of attorney was filed (R. 54, 55). It is to be remembered that Prussian already had filed in Washington a general power of attorney given to him by Mackay in 1925. No copy of such power, however, had been filed in Newark (R 99). Prussian instructed his secretary to make a copy of the power of attorney and to have it executed by Mackay. Instead of doing

this, she copied a form of a power of attorney from the Prentice Hall Tax Service and took it to the office of Mackay, who signed it. In connection with this power of attorney it is important to remember that it was prepared, not by Mackay nor at his request or dictation, but by a member of Prussian's office (R. 26). Secondly, the power of attorney given to Prussian on April 6th, 1926, was not intended to limit the general power of attorney which he had received in February, 1925, but was given to him merely to collect the check (R. 31).

The very next day, April 7th, Prussian informed Mackay's secretary, who was Miller's brother, that he had obtained the check and would be glad to deduct his fee in both the estates and send them the difference. This was refused and Miller insisted upon the payment of the entire amount of the check before considering the question of fees (R. 101, 102). On the same day, Prussian, in the presence of one, Buckman, a Government witness, endorsed the check by signing Mackay's name; then his own, as attorney; and then his own, individually (R. 104). It is important to remember that this testimony, relative to the signing of all three signatures at one time before Buckman, is corroborated by the latter's own testimony on direct examination (R. 61). Moreover, Prussian's testimony on that point remained uncontradicted since the Government witness, Buckman, was not called in rebuttal. All this testimony, although undisputed by both sides, was totally disregarded by the Circuit Court. Can there be a forgery where the signature alleged to be simulated was written in the presence of the party to whom the draft was assigned and known by that party, a Government witness, to be Prussian's writing and not the payee's?

A sum of money considerably less than Prussian's

agreed fee, which was 25% and not 15% as stated in the opinion of the Circuit Court (R. 139), was paid to Buckman for a debt then due to him by Prussian (R. 67). The proceeds of the check, less Prussian's fee, were offered to Miller a number of times and, on his refusal to accept anything less than the full amount, were deposited at the office of a reputable law firm in New York City who are authorized to pay out that money upon request (R. 105).

It is to be noted that Prussian never denied that he signed Mackay's name and his own, as attorney, to the back of the draft (R. 36), nor did he deny any of the facts in the case (R. 137). It is submitted that this Court will find in its reading of the record in this case that the action herein is the result of persistent persecution by a disgruntled client.

Reasons Relied on for the Allowance of the Writ.

I. It is submitted that the Circuit Court erred in holding that an endorsement upon a genuine Government draft is "an obligation or security of the United States" within the meaning of Sections 147 and 148 of the Penal Code (Title 18, U. S. C. A., Secs. 261, 262). This question has not heretofore been decided by this Court although in *Dunbar* v. *United States*, 156 U. S. 185, this Court held at page 190 that the purpose of the sections herein involved is the protection of the bonds or currency of the United States and not the punishment of any fraud or wrong upon individuals. The Circuit Courts are in hopeless conflict on this point. The Circuit Court in this case followed the Fifth Circuit in holding that Section 148 was applicable to an endorsement on a gen-

uine Government draft. The indictment in this case is worded in accordance with that opinion. The Eighth Circuit, however, has twice held in *Lewis* v. *U. S.* (1925), 8 Fed. (2nd) 849, and *Gesell* v. *U. S.* (1924), 1 Fed. (2nd) 283, that an endorsement is not an "obligation or security of the United States" and that an indictment such as we have here which charges the forging of an endorsement upon a Government draft, is not punishable under the Federal Penal Code. The latter cases specifically mention and discuss the conflicting decisions of the Fifth Circuit. It is vital that these irreconcilable opinions be finally passed upon by this Honorable Court. Is the Government an interested party if an endorsement is forged upon a genuine draft issued to an agent of the payee authorized to receive it? Can it be said that Congress intended Sections 147 and 148 to apply to such a situation?

II. The petitioner was convicted of a crime he never committed. The undisputed testimony, as presented by the Government, showed that the petitioner was the duly authorized agent of Mackay to receive the check. Secondly, all the endorsements were made *in the presence of* the man to whom the draft was assigned. He knew it was Prussian's act—and no one else's. In affirming the judgment of conviction for forgery, the Circuit Court completely disregarded the practically unanimous decisions of state and federal jurisdictions in America and of the courts in England to the effect that a false statement of fact in the body of an instrument, or a false assertion of authority to write another's name, or to sign his name as agent, by which a person may possibly be deceived and defrauded, is *not* a forgery—although it may be some other offense. *Commonwealth* v. *Baldwin*,

11 Gray 197, cited with approval in *White* v. *Van Horn*, 159 U. S. 3, at page 18.

The draft that the petitioner handed to the transferee was not falsely made or forged. The endorsements were exactly what they purported to be—Prussian's own signatures. He never attempted to pass the signature as that of another. Buckman, the Government witness and assignee, saw him sign all three signatures (R. 61, 104) on the draft. No matter how these were written, even if we disregard and disbelieve the petitioner's explanation of the difference in signatures, the only possible falsity, if there was any, consisted in the petitioner's assertion that he had the power to bind Mackay by the endorsement. Such an offense belongs to an entirely different class of crimes, not cognizable in the Federal courts.

III. The Circuit Court erred in holding that the petitioner did not have the authority to endorse the draft in the name of Mackay. Again, the Court chose to ignore the unhesitant testimony of the grantor of both powers of attorney that the second power was not intended to limit the general powers of the attorney under the first. It was given merely to facilitate obtaining the check and neither party ever intended it to have any other effect. Under such circumstances, *Bailey* v. *U. S.* (1926), 13 Fed. (2nd) 325, was directly in point and not, as the Circuit Court held, distinguishable. In line with the authorities that case holds that an attorney has implied authority to indorse a check or draft made payable to his client, where, as in this case, there is no testimony tending in any way to limit or restrict the implied authority arising from the contract of employment.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case entitled *United States of America, Plaintiff-Appellee, against Aaron Prussian, Defendant-Appellant,* and that the said judgment of conviction may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

AARON PRUSSIAN,
Petitioner,
By HAROLD L. TURK,
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Of Counsel.

September, 1930.

Supreme Court of the United States

OCTOBER TERM—1930.

AARON PRUSSIAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION.

Opinion Below.

The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 148) is still unreported. The decision was handed down by the Circuit Court on June 30th, 1930.

Jurisdiction.

The order for mandate of the Circuit Court of Appeals for the Second Circuit was entered on July 7th, 1930 (R. 151). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13th, 1925.

Statutes Involved.

Section 147 of the Criminal Code (Title 18, U. S. C. A., Sec. 261) provides as follows:

> The words "obligations or other security of the United States" shall be held to mean all bonds,

certificates of indebtedness, national bank currency, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other representatives of value, of whatever denomination, which have been or may be issued under any Act of Congress.

Section 148 of the Criminal Code (Title 18, U. S. C. A., Sec. 262) provides as follows:

> Whoever, with intent to defraud, shall falsely make, forge, counterfeit, or alter any obligation or other security of the United States shall be fined not more than $5,000 and imprisoned not more than fifteen years.

Statement.

A statement of the facts and of the errors relied on will be found in the petition.

Argument.

POINT I.

The indictment states no offense within Criminal Code, Section 148 (Title 18, U. S. C. A., Sec. 262), since an endorsement on a genuine draft is not an "obligation or security of the United States".

Lewis v. *U. S.* (1925, C. C. A. 8th), 8 Fed. (2nd) 849;

Gesell v. *U. S.* (1924, C. C. A. 8th), 1 Fed. (2nd) 283;
U. S. v. *Albert* (1891, D. C. Fla.), 45 Fed. 552;
Dunbar v. *U. S.* (1895), 156 U. S. 185, 15 S. Ct. 325;
22 Opinions of Attorney-General 40 (1897-99);
De Lemos v. *U. S.* (1899, C. C. A. 5th), 91 Fed. 497.

The determination of the question here presented involves a consideration of several sections of the Criminal Code. It was pointed out in *Gesell* v. *U. S.*, 1 Fed. (2nd) 283, that the words "obligation or security" are in themselves general terms, and are used in a series of sections relating to the same general category of offenses. Immediately preceding Section 148 of the Criminal Code, however, we find Section 147 (Title 18, U. S. C. A., Sec. 261), which with precision defines and quotes this very expression. This section enumerates the different classes of obligations and securities which the words quoted in said section and used in the succeeding sections, "shall be held to mean".

Sections 147, 148 and 151, respectively, were taken from Sections 5413, 5414 and 5431 of the Revised Statutes of the United States. The provisions of Section 147 have been held to apply, in their construction, to the succeeding sections in the Criminal Code. 22 Opinions of the Attorney General 40.

The Supreme Court in *Dunbar* v. *U. S.*, 156 U. S. 185, page 190, has stated that the purpose of Section 5431 (now Sec. 151 of the Penal Code) is the *protection of the bonds or currency of the United States and not the pun-*

ishment of any fraud or wrong upon individuals. It will be noted that in this case the draft, drawn by an authorized officer of the United States, was genuine. The only "obligation or security of the United States" which this indictment and the proof attempts to show was forged, is the endorsement on the back of the genuine draft.

In *Gesell* v. *U. S.*, 1 Fed. (2nd) 283, the Court said (p. 285):

> "Now section 147, after enumerating the particular 'obligations and securities' which the quoted expression 'shall be held to mean' does *not* say 'or any assignment or indorsement thereof' or use any equivalent expression. *And we must not lose sight here* of the fact that we are dealing with criminal statutes, and that in those portions of their contexts which define the offense they should be strictly construed."

In New York, for example, the Penal Code expressly provides by a *separate section* that one is guilty of forgery in the first degree who forges "an endorsement * * *, transferring * * * the right of interest of * * * a certificate, obligation * * *" (New York Penal Code, Sec. 884, subd. 4).

The Circuit Court followed *De Lemos* v. *U. S.*, 91 Fed. 497, and those cases in line with that opinion. This was a decision of the Fifth Circuit in 1899 in which the Court, while sustaining a demurrer to an indictment because of repugnant allegations in the various counts, expressed the opinion, by way of dictum, that a charge

could have been laid for forgery under Sections 5414 and 5431. The Court in the *De Lemos* case erroneously assumed that a genuine draft of the United States, if it has placed upon it a forged endorsement, may together constitute a forged obligation of the United States. In the Eighth Circuit, at a much later date, the Court said (p. 288):

> "*With this latter conclusion of the court in the De Lemos case we are not prepared to agree.* In this connection the court a little further on in the opinion pointed out the necessity of distinctly charging that the genuine draft with the forged indorsement upon it constitute together a forged obligation of the United States. Now, of course, if by mere assertion or averment the assignment, *which before was no part of the draft*, could be laid under section 5414, Rev. Stats. U. S. (now Criminal Code, Sec. 148), and by parity of reasoning in the present case the charge could be laid under Criminal Code, Section 151. *But this all assumes the identity of the original complete obligation and the independent assignment thereof.* We think this was not the intention of the Congress when it framed these three sections, each so well adapted to fill its peculiar niche, and, when taken together, so inclusive of the field under consideration and especially in view of section 5413, Rev. Stats. U. S. (now Criminal Code, Sec. 147), which so clearly and precisely defines and enumerates the particular instruments which the words 'obligations or security of the United States' then being considered 'shall be held to mean'." (Italics ours.)

Gesell v. *U. S.*, 1 Fed. (2nd) 283.

See also,

Lewis v. *U. S.*, 8 Fed. (2nd) 849.

Certainly it is incorrect to assert that a genuine draft or check is incomplete until it is indorsed. Nor does it follow that because a separate forged indorsement is placed on a genuine draft, that, thereafter, the two become a single forged obligation of the United States. On the contrary, it is a familiar rule of the law of negotiable instruments that whenever there has been a delivery of an instrument for the purpose of passing possession and control to the obligee, such instrument becomes a present and completed contract, regardless of its subsequent indorsement.

The conflict between the Eighth Circuit and those cases which follow it and the decisions of the Circuit Courts in the Fifth and Second Circuits is one that requires final settlement by this Honorable Court.

POINT II.

There was no evidence to sustain the conviction under the indictment and the forgery statute since the acts of the defendant did not constitute the crime of forgery.

Forgery is defined by Blackstone as "the fraudulent making or alteration of a writing to the prejudice of another man's right" (4 Bl. 247). It is defined by Blackburn, *J.*, as "the false making of an instrument to be that which it is not; it is not the making of an instrument which purports to be what it really is, but which contains false statements". (*In re Windsor,* 10 Cox

C. C. 118.) In our own country, it has also been precisely defined. In *Mann* v. *People* (1878), 15 Hun 155, aff'd in 75 N. Y. 484 (a leading case in New York), Westbrook, *J.*, said at page 166:

> "In other words, forgery is the attempted imitation of another's personal act, and by means of such imitation to cheat and defraud; *and not the doing of something in the name of another, which does not profess to be the other's personal act, but that of the doer thereof, who claims and insists by and in the act itself, that he is authorized to obligate the individual, whom he is assuming to obligate precisely as he undertakes to do.*"

The essence of the offense of forgery, therefore, is the making of a false writing with the intent that it shall be received as the act of another than the party signing it.

> 26 Corpus Juris, 898, Sec. 5;
> *Ex parte Geissler* (1912, D. C. N. Y.), 196 Fed. 168.

The indorsements on the back of the genuine draft in this case are as follows:

> (signed).....Malcolm S. Mackay.....
> (Sign on this line)
> Admr. Est. of Jennie E. Mackay
> Aaron Prussion, Atty.
> Aaron Prussian
> Pay to the order of
> Bank of Coney Island
> J. L. BUCKMAN

We have at the outset of this case this cogent evidence: First, Prussian had the authority to receive the

check, and secondly, he endorsed Mackay's name and then his own as attorney in Buckman's presence. The latter, of course, understood that in writing as he did Prussian was purporting to act for Mackay as his duly authorized agent (R. 61). Such an assumption of authority is clear from a reading of the back of the instrument itself.

The authorities are overwhelmingly to the effect that the unauthorized signing of another's name to an instrument as his agent for fraudulent purposes does not constitute forgery, though it may be some other crime.

Commonwealth v. *Baldwin* (1858), 11 Gray 197, 71 Am. Dec. 703;

Mann v. *People* (1878), 15 Hun 155, aff'd 75 N. Y. 484;

International Finance Corp. v. *People's Bank* (1928, D. C. W. Va.), 27 Fed. (2nd) 523, aff'd (1929, C. C. A. 4th) 30 Fed. (2nd) 46;

Ex parte Geissler (1912, D. C. N. Y.), 196 Fed. 168;

In re Tully (1884, C. C. N. Y.), 20 Fed. 812, 22 Blatchf. 213;

U. S. v. *Wentworth* (1882, C. C. N. H.), 11 Fed. 52;

People v. *Bendit* (1896), 111 Cal. 274, 43 Pac. 901;

Barron v. *State* (1913), 12 Ga. App. 342, 77 S. E. 214;

In re Heilbonn (1853), 1 Park. Crim. Rep. (N. Y.) 429;

Ex parte Offutt (1925), 29 Okla. Crim. Rep. 401, 234 Pac. 222;

State of North Carolina v. *Lamb* (1930), 198 N. C. 423;

Regina v. *White* (1847), 2 Car. & K. 404.

In *Mann* v. *People,* 15 Hun 155, the defendant, a county treasurer, executed and issued a pretended county obligation purporting on its face to be executed by him as agent of the Board of Supervisors of the County of Saratoga. He had no such authority and appropriated the money to his own use. The lower Court said, at page 162:

> "The instrument in question purported to be the act of Henry A. Mann. It may be that it purported to be legally binding on the County of Saratoga. But the *act*—that is, the doing the physical act as distinct from the legal effect—was the act of the prisoner. There is undoubtedly a sense, as urged by the counsel for the people, in which such an instrument may be said to purport to be the act of the county. But that is a statement of the legal effect. As a matter of fact, the instrument purports to be the act of Mann. He signed it in his own name, adding the title of his office—an office which he legally held."

As pointed out in the *Mann* case, it is to be noted that in all cases of alleged forgery, a substantial difference may be traced. Did the person who is accused of crime put forth the instrument with the fraudulent pretense that, as issued, it was written or signed by some person other than himself, or did he plainly state that he was the writer or signer, but falsely assert at the same time therein that his act was obligatory on some other person? In other words, was the wrong done by means of a false representation, written or oral, as to his authority to bind another? These two classes of acts seem to be essentially different. "Telling a lie does not become forgery because it is reduced to writing." *In re Tully,* 20 Fed. 817.

In *Regina* v. *White*, 2 Car. & K. 404, the prisoner was charged with endorsing a check without authority "Per procuration, Thomas Tomlinson, Emanuel White" in the presence of the indorsee. It was argued for the prisoner that the writing was not made as the writing of another, but avowedly that of the prisoner himself; and though he might have committed fraud in saying that he was authorized to make the endorsement, that was not a forgery but a mere false pretense. The fifteen judges then sitting unanimously concurred in holding that a conviction for forgery in such a case was wrong.

The soundness of the decision in *Regina* v. *White*, in deciding that there could be no forgery where the act charged did not purport to be the act of any other than the prisoner, has never been questioned and the case has been consistently followed in America, as well as in England. *People* v. *Bendit*, 111 Cal. 274. Of particular interest in this connection is the passage of the Forgery Act of 1861 (Stat. 24 & 25 Vict. Chap. 98, Sec. 24), after the decision in *Regina* v. *White*, which made it a felony "to indorse * * * any Bill, note, or other Security for Money, by procuration or otherwise, for, or on account of any other person * * *".

When, therefore, Prussian signed the name of Mackay and his own as attorney, holding himself out to Buckman, by such writing, as the duly authorized agent of Mackay, even if such representation was false, his prosecution under a forgery statute of the United States cannot be sustained. Nor can it be argued that because the signatures of Mackay and Prussian do not seem to be the same, that a different rule of law may be predicated on that fact alone. The fact remains that Buckman was not for one moment misled into believing that the signature

was the genuine act of Mackay, but knew that Prussian had signed the instrument as attorney, upon which representation of authority he placed his reliance. There was no false writing here. The falsity, if there was any, lay in the misrepresentation of authority. The intent in forgery is different from the intent to obtain money under false pretenses. The intent to defraud must be to defraud by means of the false writing; if there is no false writing, the intent to defraud cannot make it forgery. Certainly the trial Court or Circuit Court in every case should not be left to determine whether a forgery has or has not been committed when one signs the name of another *as agent, purporting to have such authority*, by seeing whether the signatures are alike or whether they are different, no matter how innocent the reason for their difference. To assert such a rule is to fail to distinguish between the essence of the crime of forgery and the essence of the crime of obtaining money by false pretenses.

The falsity of the act of writing another's name to constitute forgery must consist in the intent that it shall pass and be received as the act of the other party. To argue that third parties may be deceived, though Buckman was not, is to beg the question. If the writings were genuine and known to be such by Buckman, if he relied solely on Prussian's authority to bind Mackay, then the injury he suffered was by reason of the false representation and anyone else, if they were injured, suffered for the same reason. What Prussian wrote was his genuine act and so whether third parties were defrauded or not, it would not be forgery. If it was not forgery at the time the instrument was passed to Buckman, it could not be thereafter. Suppose Prussian had had the undisputed authority at that time to sign Mackay's name?

Or the proof showed that the signature was an absolute innocent act? Would such writings, thereafter, become forgeries merely because some third party saw a difference in the handwritings? Reduced to such an absurdity, the answer to these questions seems plain enough.

In the *Heilbonn* case, 1 Park, Crim. Rep. (N. Y.) 429, not only was there affirmative proof of attempted simulation with resultant differences in handwriting, but the defendant actually stole the draft, a situation which does not exist in our own case. In holding that the offense of forgery had NOT been committed under circumstances similar to our own, the Court said:

> "It might not be necessary to refer to these authorities, for it is the essence of forgery that one signs the name of another to pass it off *as the signature, or counterfeit of that other.* This cannot be when the party openly, and on the face of the paper, declares that he signs for the other, there he does not counterfeit the name of the other, nor attempt to pass the signature as the signature of that other. *The offense belongs to an entirely different class of crime* * * *." (Italics ours.)

The consistent holdings by eminent jurists and courts of various jurisdictions that the endorsing of another person's name as agent or attorney is not a forgery, has made it the settled law of this country. Petitioner strenuously contends that the prosecution in this case should not have been under a forgery statute, but, if there was any fraud committed, the prosecution should have been under the State statutes especially designed to make criminal other frauds, cheats and false pretenses which are not forgery. Justice could be amply accom-

plished by such prosecutions. It is to be remembered that forgery is a grave crime. No matter how small the amount involved, forgery is always made a felony. But obtaining money or other property by false pretenses, where the party defrauded gives credit, not to the genuineness of a writing but to the person who deceives him, is made a misdemeanor or felony, according to the amount of money involved. In forgery, motive and intent are of little consequence. But in such crimes as larceny, embezzlement, obtaining money by false pretenses, the element of intent plays an important part in the trial of the defendant and the latter may be able to show circumstances to prove his innocence, which circumstances might be totally disregarded by a jury in a trial for forgery.

> "The broad and well established distinctions above set forth cannot be ignored by courts or jurors—even when in their opinion a more severe punishment should be imposed on a defendant than the one which the law prescribes for the offense of which he is guilty. As was said in *Mann* v. *People, supra*, 'whatever his misdeeds, he must not suffer for a crime which he has not committed'."
>
> *People* v. *Bendit*, 111 Cal. 274.

And in Rex v. *Arscott* (6 Carr. & Payne 408), in concurring with Littledale, *J.*, that forgery had not been committed under circumstances similar to the one here involved, Vaughan, *J.*, said:

> "I am of the same opinion and I think it is much better that the most guilty offender should escape than that the law should be strained to meet any particular case."

POINT III.

Prussian had the implied and express authority from the undisputed evidence to indorse the draft in the name of Mackay and such act did not constitute forgery.

As has been heretofore stated, Prussian was retained by Mackay to obtain a refund of taxes paid by the estate to the Government (R. 66). Miller and Mackay knew nothing about the manner of the collection of such refunds from the Treasury Department. So it was, that when Prussian was retained, he was given a general power of attorney to prosecute the claim and to obtain the largest amount of money in refund. This power of attorney (R. 130) reads in substance as follows:

> "I, Malcolm S. Mackay * * * have made, constituted and appointed * * * Mr. Aaron Prussian * * * my true and lawful attorney for me and in my name, place and stead, to represent me and act for me in connection with all matters in any way relating to the Federal Income Tax return * * * to represent me and act for me in prosecuting a claim for refund * * * giving and granting unto my said attorney, full power and authority to do and perform all and everything requisite and necessary to be done in and about the premises as fully, to all intents and purposes, as I might or could do if personally present * * *."

This power of attorney was given on February 27th, 1925, and it is to be noted, was never revoked thereafter (R. 99).

There can be no dispute that an attorney to whom a

claim has been given for collection is thereby duly authorized to receive the amount due thereon from the debtor and as an incident thereto, possesses the power to endorse a draft given in payment.

Bailey v. *U. S.* (1926, C. C. A. 9th), 13 Fed. (2nd) 325;
National Bank of the Republic v. *Old Town Bank* (1902, C. C. A. 7th), 112 Fed. 726;
Brown v. *Grimes* (1921), 74 Ind. App. 655.

We have seen that Prussian prosecuted the claim in the Jennie E. Mackay estate to a successful conclusion (R. 99). He was authorized to receive the draft as a means of procuring payment of the refund (R. 31). He acted both as attorney and attorney in fact for Miller in a difficult tax proceeding. Having taken the draft in the due course of his employment, he certainly had the authority to make a formal endorsement in behalf of Mackay for the purpose of receiving the money then due him. That this would be a logical incident to his power to collect the refund and the draft cannot be doubted. We have pointed out that Prussian honestly believed he had the authority to make the endorsement and that the amount of the refund, minus his legitimate fees, were offered back to Mackay by Prussian and when refused, placed on deposit with a New York City law firm (R. 105). As a matter of fact, to have held the instrument for any length of time without cashing it might have made him chargeable with negligence in the performance of his professional duties.

It will be noted that in all the above cited cases, there is no question of the power of an attorney to transfer a draft or check received in payment so that he may

collect money for his client. The problem of the disposition of the money thereafter becomes one between the attorney and client. If there is an actual conversion, the attorney may be prosecuted for embezzlement. If there is a dispute as to the amount of the fee, a civil action between the parties will usually determine their right. But the drawer or maker is protected. When we consider that the general power of attorney was always on file in Washington where the draft was payable, and that Prussian was the undisputed agent of Mackay to receive the check, there can be little doubt that if a suit were instituted against the Government to recover the amount of the draft, the paid check or draft, with the endorsement thereon, would constitute a full and complete defense.

That the trial Court was aware of the weight of authority in appellant's favor is evident from its charge.

> "Ordinarily if he was employed by Mackay to collect it (referring to the check), that would carry with it the authority to sign Mackay's name."

Appellant is certain that no question would have been raised as to Prussian's authority to endorse Mackay's name to the draft if it had not been for the second power of attorney which is almost an exact copy of the first power of attorney except that it contains the additional clause empowering Prussian to receive but not to endorse checks. It is extremely vital, in this connection, that the circumstances under which this power of attorney was given, the conduct of the parties and their intention at the time the instrument was given, be carefully considered. The evidence at the trial clearly

showed that the second power of attorney was merely given to Prussian to facilitate his getting the check on file in Newark and was not intended to limit, in any way, his authority under the first power of attorney. This testimony came, not from Prussian, but from the party who gave the power, the Government witness (R. 31). Neither party considered the second power any more than a mere formality necessary for obtaining the draft. This evidence bearing on the intention of the parties should not have been disregarded by the Court or jury, as was done in this case (R. 128). In the case of *In re Tidewater Coal Exch.* (1923, D. C. N. Y.), 292 Fed. 225, Judge Learned Hand said (p. 232):

> "Nevertheless, it is always necessary to know what conduct the parties had in mind when they used the words chosen for the promise. Nor is there any limitation whatever on the right of a court to hear any facts which will throw light on what that conduct was. Wigmore, section 2470. The ancient statements of the books that a document must be read within its four corners is no longer the law and has not been for a century. Words must always be translated into things or conduct, and they cannot be unless the setting is in proof in which they are used. * * *
>
> I am free therefore to read this language as referring to that conduct which the parties must have intended, regardless of its correspondence with the common use of the words chosen."

What did the parties intend? What were the circumstances that surrounded the giving of the second power of attorney? We refer the Court to the testimony of *both* parties to the controversy. Such evidence bears repetition. Miller testified that the first power of at-

torney was given by him together with the retainers to Prussian. That was in February, 1925 (R. 28). Pursuant to that power filed in Washington, Prussian appeared for the Mackay estate. On April 6th, 1926, almost a year later, Prussian went to Newark for the draft (R. 51). He was told he would have to file another power of attorney in Newark. There was no special form necessary. Prussian instructed his secretary to prepare a copy of the power of attorney then on file in Washington. Instead of making an exact copy, she prepared another form of power of attorney which she took from the Prentice Hall Tax Service (R. 99). The very fact that the two papers are almost identically alike in language indicates that they were copied from a form book and the additional clause inadvertently inserted. Miller testified that Prussian, and not he, drew the second power of attorney (R. 26). Is it reasonable to suppose, at the outset, that Prussian himself would have limited his own powers—when no such specific limitation in the power of attorney was required at Newark?

But all this evidence shades into significance when we consider Miller's testimony with regard to the instrument given to Prussian in 1926. In reciting this testimony, appellant wishes to point out to the Court that this is not the testimony of Prussian, the grantee, but the evidence offered by the Government from the lips of Miller himself (R. 31):

> "Q. Did you give this second power of attorney marked Exhibit 2 for the purpose of limiting this first power of attorney? A. *No, I gave him that to collect the check.*
>
> Q. I see, and there was no intention of limit-

ing the first power by that second power of attorney? A. What?

Q. There was no intention of limiting the first power of attorney by that second power of attorney? A. No."

Where is there a scintilla of evidence in the entire record to show that *either* party intended to limit Prussian's authority under the first power of attorney? And we have already pointed out his implied authority to endorse the draft under that power.

In *Bailey* v. *U. S.*, 13 Fed. (2nd) 325, the facts were precisely the same as in our own. A check or draft payable by the United States through its Treasurer to the order of one, Hochrey, as administrator, came into the possession of Bailey, as attorney for the estate. Bailey endorsed the check or draft in the name of the administrator, adding his own name to the endorsement. He then deposited the check or draft to his own account in the bank. This occurred early in the year 1922 and Bailey did not account to the administrator until some time early in the year 1925, when he was called upon by a special agent of the Government. Bailey admitted that the endorsement was his and later on an indictment containing two counts, charging him with forgery, was returned against him. On appeal, one of the assignments of error was the insufficiency of the testimony to support the verdict and judgment. In holding that no crime had been committed, the Court said:

"On the other hand, if the plaintiff in error had implied authority to indorse the check or draft arising out of his employment, there was no forgery of the indorsement, no uttering or publish-

ing of the forged instrument, and no offense against the laws of the United States, whatever crime may have been committed against the laws of the state.

We think the latter view is the correct one."

If, then, Prussian had the implied authority to endorse the draft, and if this implied authority, reaffirmed in the first power of attorney, was not limited in any way by the second, as Miller testified, it was error for the Court to refuse to charge the jury "that if they believe the testimony of Mr. Miller to the effect that the second power of attorney was not intended to limit the first power of attorney they must acquit" (R. 128). For similar reasons it was error for the Court to deny defendant's motion for a directed verdict (R. 123). Prussian had the authority to endorse the draft and his acts, therefore, did not constitute the crime of forgery.

In concluding this discussion petitioner wishes to again point out how exceedingly dangerous it is to stretch the crime of forgery to cover circumstances of this kind. Prussian undoubtedly believed he had the authority to sign Mackay's name. We have shown his justification for such belief. If he had been charged with some crime other than forgery, proof of his honest belief that he was entitled to deduct his fees or that there had been a subsequent ratification by his client would have been material and relevant. Instead, such evidence was ruled out or ignored (R. 35, 36) and the channels closed for such discussion—because the charge was forgery. It is dangerous legal reasoning to conclude that every act of signing another's name constitutes the crime of forgery.

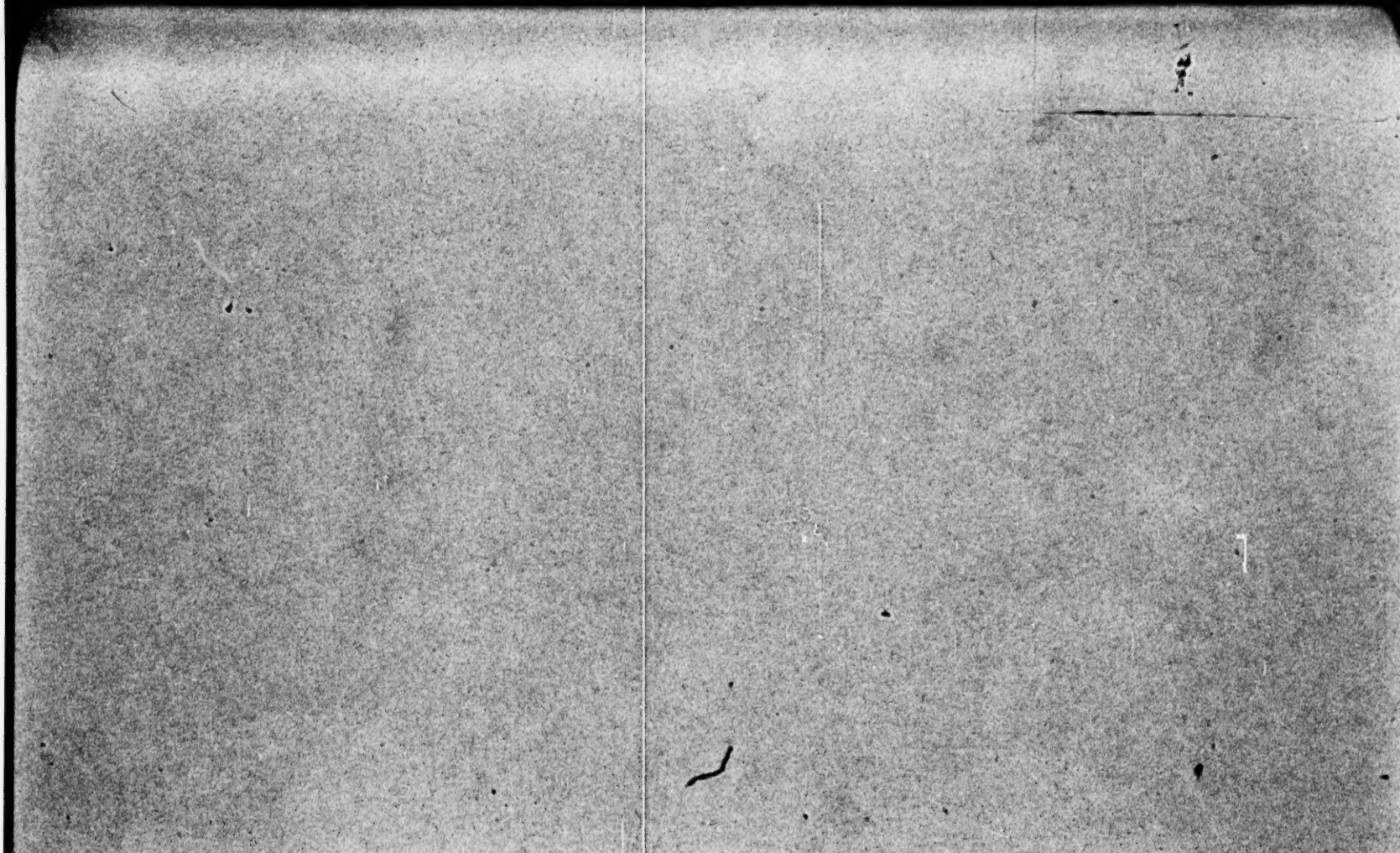
CONCLUSION.

The petitioner submits that the decision of the Circuit Court of Appeals was erroneous and, in view of the extreme importance of the questions herein involved, prays that a writ of certiorari be granted and this Court review the decision of the Circuit Court and finally reverse it.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 448

AARON PRUSSIAN

—against—

THE UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR AARON PRUSSIAN.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 448.

AARON PRUSSIAN

—against—

THE UNITED STATES OF AMERICA.

Opinion of Court Below.

The opinion of the Circuit Court of Appeals for the Second Circuit, in this case, is reported in 42 Fed. (2d) 854.

Statement of the Case.

In February, 1929, the Grand Jury for the Eastern District of New York returned an indictment charging petitioner with (1) forging an obligation of the United States, and (2) uttering the same (R. 5). A demurrer to said indictment was filed and overruled (R. 8, 9) and the case was thereafter moved for trial, during which the second count was dismissed by the Trial Judge (R. 89). Petitioner was convicted of the offense charged in said first count (R. 93), and was sentenced to imprisonment of five years and a fine of $200 (R. 94). The judgment was affirmed by the Circuit Court of Appeals (1930, C. C. A. 2) 42 Fed. (2d) 854. Thereupon application for a writ of certiorari was

made to this Honorable Court, which writ was granted on October 20, 1930, and is reported in 51 S. Ct. In the order allowing certiorari, the Court limited the question to whether the indictment states an offense under the Criminal Code.

Specification of Assigned Error Intended to be Urged.

The assigned error intended to be urged is accordingly limited to the proposition that said indictment does not state an offense under the Criminal Code.

ARGUMENT.

Introduction and Summary.

The indictment, narrowed, charges that petitioner forged "a certain obligation of the United States, to wit: the *indorsement*" on a draft for $9,044.37 which had been drawn by one, J. L. Summer, disbursing clerk of the United States Treasury, upon the Treasurer of the United States, to the order of Malcolm S. Mackay, "which said draft was an obligation of the United States". (The face of the check or draft, and also the reverse side thereof with the several indorsements, is fully set forth.) The said indictment then charges that "said draft for money was *duly issued* to the said Malcolm S. Mackay * * * and thereafter the defendant * * * did then and there falsely forge the endorsement on the said draft by falsely forging the name of the payee, to wit: the words 'Malcolm S. Mackay' on the back (thereof); *that the said draft for money with the forged endorsement thereon did*

*together constitute a forged obligation of the United States * * **".

The only statute which punishes the forgery of the government obligation described in said indictment is section 148 of the Criminal Code, under which the indictment purports, and is claimed, to have been drawn. Said section (now 18 U. S. C. A. sec. 262) is in the following language:

> **"Counterfeiting securities.** Whoever, with intent to defraud, shall falsely make, forge, counterfeit, or alter any obligation or other security of the United States, shall be fined not more than $5,000 and imprisoned not more than 15 years."

The words "obligation or other security of the United States" are defined in the preceding section, 147 (now 18 U. S. C. A. sec. 261), as follows:

> **" 'Obligation or other security of the United States' defined.** The words 'obligation or other security of the United States' shall be held to mean all bonds, certificates of indebtedness, national bank currency, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other representatives of value, of whatever denomination, which have been or may be issued under any Act of Congress."

The draft described in the indictment is, admittedly, an "obligation or other security of the United States" within the meaning of section 147.

Questions Presented.

1. Does the forgery of Mackay's *indorsement* amount to a *forging of an obligation* of the United States, as charged?

2. Does the genuine draft, with a forged indorsement thereon, constitute (together) a *forged* obligation of the United States, as charged? And

3. Is the indictment sufficient as a pleading under the Criminal Code?

Part I of this argument deals with the first two questions. The history of section 148, and the decisions of this Court, show that said section punishes the crime of *counterfeiting* as contra-distinguished from the crime of forgery. The use of the word "*forge*", when applied to any obligation or security of the Government, implies that it *purports* to be such an instrument and to have been *duly issued* but, in fact, is not, and never was, genuine or valid. The forgery of an *indorsement* does not amount to a *forging of the draft itself*, which is the sole act of the Government, and contains its promise to pay; whereas the indorsement is the separate act of a person claiming a right to the instrument, and amounts to nothing more than the assignment of a mere chose in action. The statute deals with forfeitable property, and not with *indorsements* of negotiable instruments.

Part II of this argument will consider the decisions relied upon by the Circuit Court in this case, in order to show the errors therein. Said decisions (1) interpret the word "obligation" as meaning a debt or a duty instead of recognizing that Congress has legislated in section 147 of the Criminal Code what the word "shall

be held to mean"; (2) they interpret the statute as directed against the crime of "forgery" as distinguished from "counterfeiting"; (3) they erroneously rely upon cases which are not authority for their conclusions; and (4) their rulings are contrary to authoritative decisions of this Court.

Part III is directed to the proposition that the indictment is insufficient as a pleading under the Criminal Code. A summary of the allegations in said indictment are (1) Prussian counterfeited an "obligation of the United States"; (2) the "obligation" which he counterfeited was the "indorsement" upon a draft for money; (3) the said draft was an obligation of the United States and was duly issued; (4) Prussian forged Mackay's name on the back thereof; and, (5) the said draft was not a counterfeited obligation, nor was the indorsement alone a counterfeited obligation, but together they constituted a forged obligation of the United States. These allegations are repugnant; they are uncertain, and do not inform the accused exactly of what he is charged. The indictment lacks that precision and certainty of description which would enable him to always use a judgment upon it as a bar to any other prosecution.

I. The indictment does not sufficiently describe any forged obligation of the United States, nor does it sufficiently describe the forging thereof.

In construing section 148 of the Criminal Code, it is appropriate to refer to its history which we think will throw great light on the intention of Congress, and the meaning of the word *forged*, as used in said section.

By virtue of the express power granted to Congress

"to provide for the punishment of counterfeiting the Securities and current Coin of the United States" (Constitution, Art. 1, sec. 8, cl. 6), it was provided in the first crimes Act that the counterfeiting of public securities should be punishable by death. Act April 30, 1790, section 14 (1 Stat. 112, 115), so far as here material, was in the following language:

> "And be it (further) enacted, That if any person or persons shall falsely make, alter, forge or counterfeit, * * * any certificate, indent or other public security of the United States, * * * and shall be thereof convicted, every such person shall suffer death."

With the issuance of other securities by Acts of Congress, penal provisions were placed in each of said Acts to guard the public from false and counterfeit paper, purporting on its face to be the obligation or security authorized to be issued. These provisions contained two changes from the original crimes Act; first, capital punishment was changed to fine and imprisonment, and, second, a separate clause was created to punish the alteration of genuine instruments.

Thus, in section 11 of the Act of February 24th, 1815 (3 Stat. 213, 215), authorizing the issuance of treasury notes in a sum not exceeding $25,000,000, we find this language:

> "And be it further enacted, that if any person shall falsely make, forge, or counterfeit, * * * any note, in imitation of, or purporting to be, a treasury note as aforesaid; or shall falsely alter, * * * any treasury note *issued* as aforesaid; or shall pass, * * * as true, any false, forged or counterfeited note, purporting to be a treasury

> note as aforesaid, knowing the same to be falsely made, forged or counterfeited; or shall pass * * * as true, any falsely altered treasury note *issued* as aforesaid, knowing the same to be falsely altered, * * * every such person shall be deemed and adjudged guilty of felony; and being thereof convicted by due course of law, shall be sentenced to be imprisoned * * *." (Italics ours.)

It is to be noted that the first clause penalizes one who shall *forge any note, in imitation of, or purporting to be, a genuine treasury note*, whereas the second clause punishes the alteration of any treasury note *issued* as aforesaid. The same distinction appears in the third and fourth clauses of said section. The omission of the word "*issued*" from the first and third clauses discloses that the words *falsely make, forge or counterfeit* were intended to apply to instruments which, in their very inception, had been falsely conceived, and were not intended to apply to instruments which had been *issued* by the Government.

Said section 11 of Act February 24, 1815, again appeared in section 18 of Act April 10, 1816, incorporating the Bank of the United States (3 Stat. 266, 275). The only changes were those which were necessary to adapt the provisions to the bills, notes, orders, or checks of said bank. Two noteworthy cases arose under this section. In *United States* v. *Turner* (1833), 32 U. S. 132, 7 Pet. 132, 8 L. Ed. 633, the accused was charged with forging the names of officers of the bank as the *makers* of the notes of said bank. In discussing the construction to be given to section 18 of said Act, Mr. Justice Story said (p. 136, 32 U. S.):

> "The object is to guard the public from false

and counterfeit paper, purporting on its face to be issued by the bank."

The other case was *U. S.* v. *Stewart* (1818), in which Mr. Justice Washington, of this Court, while sitting in Circuit, was called upon to determine whether the forgery of an *indorsement* upon a genuine post note of the bank of the United States was an offense within the meaning of said section. 4 Wash. C. C. 226 (Fed. Cases 16402). The Court fully analyzed the statute and concluded that the case was not within the Act of Congress. Inasmuch as the opinion in that case is the only definite ruling ever made by a Justice of this Court upon the identical question which is here involved, it is here set forth in full:

"There are two motions before the court: 1. For a new trial; and 2. In arrest of judgment. The indictment contains 4 counts. The two first are for forging a bill or note of the Bank of the United States, and for attempting to pass the same. The third is for falsely making and counterfeiting an order on the same bank, indorsed by the defendant upon the said bill, as follows, viz: 'Pay William Weston or order', signed 'John Thornton'. The fourth is for falsely altering a bill or note of the said bank, by the same indorsement.

The bill or note, stated in the indictment, and given in evidence, is a post note of the Bank of the United States, payable to William Jenner & Co. or order, for $100 with the following indorsement on the back of it, viz: 'Pay Mackie, Milner & Co. or order,—William Jenner & Co.' 'Pay William Jenner & Co. Mackie, Milner & Co.—William Jenner & Co.' 'Pay Churchman & Thomas or order—D. Bell.' 'Pay William Morton or order—John Thornton.'

The forgery of the last indorsement by the defendant was fully proved.

The evidence which was given at the trial, applied only to the third count; and the question is, whether the false indorsement made by the defendant, is an offense within the eighteenth section of the law for incorporating the subscribers to the Bank of the United States, passed the 10th of April, 1816.

It is perfectly clear, I think, that it does not amount to a forgery, or alteration of *the bill or note itself,* which is the sole act of the corporation, and contains its promise to pay; whereas the indorsement is the separate act of a person claiming a right to the note.

Does the indorsement upon a note or bill of exchange, requiring the contents to be paid to a third person, amount to an order, within the meaning and intent of the Act of Congress? I think not. A bill of exchange is said to be an order by the drawer upon the drawee, to pay the contents to the payee. It is also, and with equal propriety, called an assignment to the payee of so much money in the hands of the drawee. I am not disposed to fall out with either of these definitions.

But there can be no doubt, that the indorsement upon a bill or a note, directing the contents to be paid to an indorsee, amounts to nothing more than the assignment of a mere chose in action; and whether it be made in the form of an assignment, or of an order, its nature is the same. That the act did not intend, by the word *order,* to include an assignment of a bank note, may be fairly presumed from the word *check,* with which it is associated; the latter meaning in common parlance, a draft payable to *bearer,*

and it was on that account, probably, that the word was added.

I am strongly confirmed in this construction of the Act of Congress, by observing, that the statutes of England against forgery of negotiable papers of almost every kind, extend, by express words, to the indorsement made on them. Such, for instance, is the statute of 15 Geo. II c. 13, against forging the notes of the bank of England, or bills of exchange, or bonds under the seal of the corporation, *or any indorsement thereon.* Such are the statutes of 12 Geo. I c. 2 as to East India bonds; 12 Geo. I c. 32, as to the moneys of suitors in chancery; 42 Geo. III c. 1, as to exchequer bills; and 2 Geo. II c. 25, as to deeds, bonds, bills, notes, or receipts. And it is observable that the statute of 45 Geo. III c. 88, not only includes the forgery of bills and notes, and the indorsements or assignments thereof, but also any warrant or order, for payment of money.

I admit that these provisions in the English statutes, are by no means conclusive of this point. But as the nature of negotiable paper is as well understood in England, as in any country in the world, the care taken in those statutes to punish forged indorsements, proves at least, that the legislature of that country has not thought that the word *order* would be sufficient for the purpose.

As the evidence at the trial applied only to the indorsement, which in the opinion of the court is not an offense within the act of Congress, the judgment must be arrested." (Italics by the Court.)

Although said decision is reported as a Circuit Court case, it is to be borne in mind that Mr. Justice Washing-

ton was one of the Justices of this Court assigned to hold court twice a year in one of the three then existing Circuits. In those days, it was through the contact of the Justices of this Court with the Judges sitting in the Circuit Courts, that the people of the country became acquainted with the new institution, the Federal Judiciary; and it was largely through these Justices that the fundamental principles of the new Constitution and Government, and the provisions of the Federal statutes and definition of the new criminal legislation became known to the people. Warren on History of the United States Supreme Court (1922), Volume 1, page 58.

The decision by Mr. Justice Washington was rendered but two years after the passage of the Act of April 10, 1816. It constituted the definition of new criminal legislation, and must have become known to Congress, especially in view of the fact that the public securities, indents, checks, etc., were not issued in vast volume, for it then was still practicable that they be signed by the hand manual of the officers authorized to sign and countersign.

Is it not reasonable to believe that, if such decision did not interpret the statute in conformity with the intention of Congress, it would have re-enacted the law so as to make express provision for the forgery of an indorsement upon the post notes and checks of said bank? And is not the failure of Congress to thus re-enact the statute conclusive on the proposition that they did not intend that the forgery of an *indorsement* be embraced within the section, and that the decision accurately reflected and interpreted the legislative intent?

This conclusion is supported by the crimes Act, March

3, 1825. In section 17 of said Act (4 Stat. 115, 119), which section corresponds to section 18 of Act April 10, 1816, Congress embraced all the obligations and securities which had been theretofore authorized to be issued, and which included, of course, the bills, notes, orders, and checks of the bank of the United States. Said section 17, so far as applicable, was in the following language:

> "That, if any person or persons shall falsely make, forge, or counterfeit * * * any paper, writing, or instrument, in imitation of, or purporting to be, an indent * * * or other public security of the United States * * * or any bill, check, or draft for money, drawn by, or on the treasurer of the United States, or by, or on, any other public officer or agent of the United States, * * * shall be deemed guilty of a felony * * *."

The meaning of this language is plain, and is not susceptible of conflicting constructions. The word *forge* clearly and expressly relates only to an instrument *in imitation of, or purporting to be,* a genuine one. The clause penalized the counterfeiting of *the draft itself*, and obviously had no application whatever to a genuine draft or to a fraudulent *indorsement* thereon. To put it another way, the section penalized the *counterfeiting of the writings of the Government* as distinguished from *forging the writings of an individual.* This, in effect, was the construction of the prior statute by Mr. Justice Washington in the *Stewart* case.

The counterfeiting section of said Acts continued to be copied in each of the subsequent Acts of Congress relating to government obligations and securities, and in the revisions of said Acts, with only such immaterial

changes as were necessary to adapt the language to the particular instruments referred to in said Acts.

> 5 Stat. 201, 203 (Act October 12, 1837, sec. 10);
> 9 Stat. 118, 120 (Act January 28, 1847, sec. 9);
> 11 Stat. 257, 259 (Act Dec. 23, 1857, sec. 12).

In the first Act authorizing the issuance of greenbacks, Act February 25, 1862, section 6 (12 Stat. 345, 347), the form of the language was changed and the word *alter* was placed in the same clause with the words *falsely make, forge, counterfeit*. Said section, so far as material, was enacted in the following language:

> "That if any person or persons shall falsely make, forge, counterfeit or alter * * * any note, bond, coupon, or other security issued under authority of this Act, or heretofore issued under Acts to authorize the issue of treasury notes or bonds; * * * shall, on conviction thereof, be punished by fine * * * and by imprisonment * * *."

The case of *United States* v. *Howell* (1870), 78 U. S. 432, 11 Wall. 432, 20 L. Ed. 195, arose under that section. The defendant in that case contended that the Act itself was void for repugnancy, and that the passing of a *false, forged and counterfeited* note, was not made an offense because the section related only to such notes as had been *issued* under authority of one of said Acts. In discussing the purpose of the Act, and the meaning of the words *false, forged, counterfeit,* Mr. Justice Miller held (p. 436, 78 U. S.):

> "There is some degree of plausibility in this hypercriticism at first blush, which, if it were

sound, would make the Act void for want of any meaning, a result which one of the first canons of construction teaches us to avoid if possible, and which is at war with the common sense which assures us that *the purpose of the Act was to punish the making of counterfeits of the notes or bonds described in the statute.* Nor is the criticism philologically just. The offense is described as the passing of false, forged, or counterfeited notes or bonds issued under the authority of the statute. We are to give due weight to all the words implied in describing the instrument, and cannot reject the words *false, forged,* and *counterfeited* if it is possible to adopt any reasonable construction which will permit them to stand. This is done by mentally supplying the ellipsis which is in general use in conversation or in writing in similar cases * * *. Now, if the paper spoken of is a forgery it is not a bank note, which means an obligation of some bank to pay money. But here also the mind supplies the ellipsis which good usage allows, and understands that what is meant is a forged paper in the similitude of a bank note, or which on its face appears to be such a note * * *.

The use of the words false, forged, and counterfeit in the statute, implies, therefore, when applied to any of the obligations of government mentioned, that it purports to be such an instrument, but is not genuine or valid. And so are the authorities. See 2 Russell on Crimes, 801; East, Pleas, Crown, 950." (Italics ours.)

The language of the opinion is very plain, and is easily understood. It was stated that the purpose of the Act was to punish the making of a certain class of instru-

ments, to wit; *counterfeits of the notes or bonds.* In the present indictment, it is charged that the draft which was forged was genuine and duly issued by the Government. There is an obvious distinction between counterfeiting and forgery in the subject matter of the offenses. "Counterfeiting" relates to the currency and obligations of the Government; "forgery" relates to any writing which operates as the foundation of another man's liability or the evidence of his right. 15 Corpus Juris 357. The term "counterfeit", both by its etymology and common intendment, signifies the fabrication of a false image or representation. *United States* v. *Marigold* (1850), 50 U. S. 560, 9 How. 560, 13 L. Ed. 257. "As thus defined, counterfeiting includes forgery", 7 Ruling Case Law 913, but "forgery does not include the crime of counterfeiting". 12 Ruling Case Law 139.

It is suggested that the word *forged*, as used, was intended to embrace an act which was a part of the counterfeiting, because the obligations and securities, when they came from the plates were blank as to signature and were required to be signed in behalf of the United States by the Treasurer thereof and countersigned by the Register of the Treasury.

In the course of the Civil War, however, the notes, bonds and other securities of the Government came to be issued in such vast volume that it was found to be wholly impracticable to have each of them signed by the hand manual of the authorized officers of the Treasury Department. For this reason the practise of using engraved signatures was adopted in the Act of June 30, 1864, section 6, with other provisions for "*the imprint of the seal of the Treasury Department as a further evidence of lawful issue*"; and for "*such other device*

or safeguard against counterfeiting as the secretary may approve" (13 Stat. 221, c. 172).

In section 13 of said Act we find, for the first time, the words "obligation or other security of the United States", and that they "shall be held to include and mean" those instruments which now are contained substantially in section 147 of the Criminal Code, and which instruments had been authorized to be issued under the prior Acts of Congress. The definition included "checks for money of authorized officers of the United States."

Section 10 of said Act embodied the penal provisions contained in section 6 of the Act of February 25, 1862, and now found, substantially, in sections 148 and 151 of the Criminal Code. So far as it relates to section 148, its language is almost identical for it provided for the punishment of any person who shall "falsely make, forge, counterfeit or alter any obligation or security of the United States".

Section 10 of Act June 30, 1864 was placed in the Revised Statutes as section 5413 (definition clause); section 13 of said Act was broken up and placed in the Revised Statutes as sections 5414 (counterfeiting), and 5431 (passing, uttering, possession). In construing section 5413 of the Revised Statutes the Attorney General has held that the context manifestly evidenced the intention of Congress to apply the provisions of that section to the construction of the sections that follow, and the history of section 5413 and its associated origin with the succeeding sections, under the ordinary rules of statutory construction, make this perfectly plain.

22 Opinions of Attorney General, 40, 43;
26 Opinions of Attorney General, 231, 233.

Section 5431 of the Revised Statutes was construed by this Court in *Dunbar* v. *U. S.* (1895), 156 U. S. 185, 190, 15 S. Ct. 325, 328, 39 L. Ed. 390. The indictment in that case was for smuggling, and in comparing the statutes there involved with section 5431 of the Revised Statutes, and in referring to the latter, this Court held:

> "The purpose of the statute in that case is the protection of the bonds or currency of the United States, and not the punishment of any fraud or wrong upon individuals. Hence it is not sufficient to charge that a party is trying to defraud an individual, and, in carrying that fraud into execution, uses a bond or note of the United States which he may suppose to be genuine, but which in fact is counterfeit. For that discloses no criminal intent in respect to the bond, or note, but only a criminal intent as against the individual sought to be defrauded, an intent which may exist independent of any knowledge or character of the bond or note."

The essence of this decision is, we think, that the statute punishes the crime of counterfeiting and has no relation to fraudulent indorsements, assignments, or transfers of genuine instruments. The criminal intent must be in respect to *the instrument itself* and not as against any individual sought to be defrauded by means of a genuine government obligation.

Sections 5413, 5414 and 5431 of the Revised Statutes were placed in the Criminal Code as respectively sections 147, 148 and 151, and in 1926 were incorporated in the present United States Code, Title 18, as, respectively, sections 261, 262 and 265 within chapter 7, which is headed **"Offenses against Currency, Coinage, etc."** Section 262 is entitled: **"Counterfeiting Securities."**

We have made a somewhat extended reference to these earlier statutes, and to the decisions thereunder, to show that the use of the word *forge*, in section 148, when applied to any of the obligations mentioned in section 147, implies that it is *in imitation of, or purports to be*, such an instrument and to have been *duly issued*, when in fact it is not, and never was, genuine or valid. A forged obligation of the United States means a counterfeit thereof, and does not mean a genuine draft for money with a fraudulent indorsement thereon, because a false indorsement is not a false image of any act of the Government.

United States v. *Howell* (*supra*);
United States v. *Stewart* (*supra*);
United States v. *Turner* (*supra*);
Dunbar v. *United States* (*supra*).

There are, however, other considerations which point to the same conclusion. It has been observed that section 148 punishes one, who with fraudulent intent, falsely makes or alters *any obligation or other security of the United States*, and that section 147 quotes the very words, and precisely defines the particular instruments which the quoted words *shall be held to mean*. The definition includes, among others, "checks, or drafts for money, drawn by or upon authorized officers of the United States".

It is clear that in section 148 of the Criminal Code, Congress legislated with respect to those "obligations and securities" as are defined in section 147; and that when the present indictment charges the forging of an "obligation of the United States", it is equivalent to an allegation charging the forging of one of the particular instruments defined and included in section 147.

It is to be noted, however, that section 147, after precisely defining and enumerating the particular "obligations or other securities" which the quoted words "shall be held to mean" does not say "or any indorsement thereon", nor does the statute contain any equivalent expression.

It is admitted, of course, that the draft by Summer, the Treasury Department disbursing clerk, to Mackay, described in the present indictment, is an "obligation of the United States" within the plain meaning of section 147. The forging of such a draft is, without question, an offense under section 148.

But the indictment charges that Prussian forged "an obligation of the United States, to wit, the *indorsement* on a draft for money", and thereby charges the forging of an instrument which is not included within that definition which Congress legislated the quoted words "shall be held to mean".

It is persuasive that in the original statute contained in the Act of 1790 (1 Stat. 112, 115), and in all of the subsequent Acts which authorized the issuance of the Government's "obligations or securities", and in all of the re-enactments, re-codifications, and amendments of said statutes, Congress has never included the word "indorsement" or used any equivalent expression in penalizing the "false making, forging or counterfeiting", or "altering" of said "obligations and securities".

1 Stat. 112, 115 (April 30, 1790, Sec. 14);
3 Stat. 213, 215 (Feb. 24, 1815, Sec. 11);
3 Stat. 266, 275 (April 10, 1816, Sec. 18);
4 Stat. 115, 119 (March 3, 1825, Sec. 17);
5 Stat. 201, 203 (Oct. 12, 1837, Sec. 10);
9 Stat. 118, 120 (Jan. 28, 1847, Sec. 9);

11 Stat. 257, 259 (Dec. 23, 1857, Sec. 12);
12 Stat. 345, 347 (Feb. 25, 1862, Sec. 6);
13 Stat. 218, 221 (June 30, 1864, Sec. 10):
Revised Statutes, sections 5413, 5414;
Criminal Code, sections 147, 148;
United States Code, sections 261, 262.

If it was intended in section 148 to penalize the forgery of an indorsement upon the check described in the present indictment, as the Court of Appeals held that it did in this case, why did not Congress expressly so state by including the word in section 147? Congress did not merely forget indorsements upon the Government's checks, if such a thing were possible in the many statutes, special acts, re-enactments, re-codifications, and amendments.

Congress remembered *indorsements* and thought of them, and when they desired to penalize fraudulent indorsements upon Government instruments, they expressly so stated. For example, pension checks issued by the government are obligations or securities within the definition of section 147, and to *falsely make or alter* such a check is punishable under section 148. Yet, as evidence that Congress knew that said section did not embrace the *forging of an indorsement of a genuine pension check*, express provision was made therefor in 38 U. S. C. A. section 128 which is in the following language:

> **"Forgery of Indorsement of Pension Checks.** Whoever shall forge the indorsement of the person to whose order any pension check shall be drawn, or whoever with the knowledge that such indorsement is forged shall utter such check * * * shall upon conviction be punished * * *." (Aug. 17, 1912, c. 301, sec. 4, 37 Stat. 313.)

If the words in section 147, "checks or drafts for money" include an indorsement, the forgery of which is punishable in section 148, why was it necessary for Congress to enact the said provision of law on August 17, 1912, covering the identical offense with respect to genuine pension checks? It is worthy of note that said section is entitled: "Forgery of Indorsement of Pension Checks". It is not entitled "Counterfeiting Securities", as is section 148 of the Criminal Code. But if the Court below is correct, *both statutes* penalize the forgery of an indorsement of pension checks. We contend that there is a manifest distinction between the subject matter of the two statutes; that section 148 relates to the criminal act of falsely making the check itself and not to any writing which passes title to a genuine instrument. For this reason section 148 does not embrace the forgery of an indorsement of a genuine pension check, nor does it embrace the forgery of an indorsement of any other genuine check.

There are, also, postal notes and money orders issued by the Post Office Department. Such instruments are "obligations or securities" within the meaning of section 147, and the forgery either of postal notes or of money orders may be prosecuted under section 148. Yet Congress makes express provision for the punishment of a forged indorsement upon either class of such instruments, whether genuine or spurious. Section 218 of the Criminal Code (now 18, U. S. C. A. sec. 347) provides:

> **"Counterfeiting Money Orders.** Whoever, with intent to defraud, shall falsely make, forge, counterfeit, engrave, or print, * * * any order in imitation of or purporting to be a money order issued by the Post Office Department, or by any

> postmaster or agent thereof; or whoever shall forge or counterfeit the signature of any postmaster, chief clerk or clerk upon or to any money order, or postal note, * * * or any material signature *or indorsement thereon* * * *; or shall falsely alter * * * in any material respect * * * any such money order or postal note; or shall, with intent to defraud, pass * * * any such money order or postal note; or shall, with intent to defraud, pass * * * any such forged or altered money order or postal note, knowing any material signature *or indorsement thereon* to be false, forged, or counterfeited * * * or shall, with intent to defraud the United States, or any person, transmit or present to * * * or at any office of the Government of the United States, any money order or postal note, knowing the same to contain any forged or counterfeited signature to the same, or to *any material indorsement, receipt, or certificate thereon* * * * shall be fined * * * or imprisoned." (Italics ours.)

If the forgery of an indorsement of a genuine obligation is punishable under section 148, then this provision of law, like 38 U. S. C. A. section 128, is mere surplusage in our statute books. It is to be noted, however, that section 218 of the Criminal Code refers both to genuine and to counterfeit money orders and postal notes and that Congress, by express language, penalizes the false indorsement upon either class of said instruments.

The statutes of the several states of the Union indicate likewise that a fraudulent indorsement does not convert a genuine obligation into a counterfeit. The *forgery* statutes of forty-six states penalize the forging of an indorsement, either by express use of the word or an equivalent expression. Florida and Nebraska are the

only exceptions. In direct contrast to this, the *counterfeiting* statutes of forty-six states do not mention the word *indorsement* therein, nor do they contain any equivalent expression. The exceptions here are Maine and Illinois. For citation of statutes, see appendix.

To say that the forgery of an indorsement was intended to be embraced within section 148 of the Criminal Code would be to embrace undefined extraneous matter, and would be to depart from the particular definition to a general one. Such an interpretation would give an exceedingly liberal construction to a statute defining a felony, and violates the settled rule that the words must be interpreted in their narrower sense and must be understood to mean exactly what Congress legislated they "shall be held to mean".

U. S. v. *Salen* (1914), 235 U. S. 237, 35 S. Ct. 51, 59 L. Ed. 210;

U. S. v. *Chase* (1890), 135 U. S. 255, 10 S. Ct. 756, 34 L. Ed. 117;

Fasulo v. *U. S.* (1926), 272 U. S. 620, 47 S. Ct. 200, 71 L. Ed. 443.

If it be urged, even in the light of the history of section 148 and the decisions of this Court, that the statute was intended to embrace the forgery of an indorsement, the answer must be that the crime denounced in said section is complete even though the instrument never is indorsed. When an indorsement is forged, another and distinct offense is committed. To hold that section 148 embraces this other and distinct offense would be to write into that section an offense which Congress did not place there, and which they never intended to place there.

It is persuasive that throughout the entire history of

section 148 beginning with Act of 1816, *supra*, Congress always has associated therewith a statute which embraced the methods which might be employed in counterfeiting the government obligations and securities. Section 150 of the Criminal Code, 18 U. S. C. A., section 264, provides, among other things, as follows:

> "* * * or whoever shall have in his control, custody, or possession any plate, stone, or other thing in any manner made after or in similitude of any plate, stone, or other thing, from which any such obligation or other security has been printed, with intent to use such plate, stone, or other thing, or to suffer the same to be used *in forging or counterfeiting any such obligation or other security, or any part thereof;* * * * shall be fined * * *, or imprisoned * * *." (Italics ours.)

The act of *forging*, as used in section 148, cannot be ratified, as can the act of forging an indorsement. We contend that Congress had no intention, in said section, of penalizing the forgery of an indorsement of a genuine obligation, because they were legislating with respect to a class of instruments which could not, in legal contemplation, be indorsed; they were dealing with forbidden property, contraband *per se* which was subjected to the provisions of forfeiture and search warrant. Criminal Code, sections 172, 173 (18 U. S. C. A. secs. 286, 287).

Section 148 does not cover the offense as alleged in the indictment, and, however reprehensible the act of forging an indorsement may be, the Court cannot sustain the indictment on that ground. The statute is highly penal, renders its violators liable to both fine and imprisonment, and must be strictly construed. This Court has held, on several occasions, that the purpose

of the statute is to punish the making of a certain class of instruments, namely, *counterfeits of the obligations* described in the statute. The words of section 148 do not suggest any other intention, and it is not permissible to search for an intention that the words themselves do not suggest. Full effect is given to the statute by holding that its purpose is the protection of the bonds and currency of the Government, and not the punishment of fraudulent assignments of mere choses in action.

United States v. *Howell, supra;*
United States v. *Stewart, supra;*
Dunbar v. *United States, supra;*
United States v. *Turner, supra.*

For all of the foregoing reasons, it is submitted that the answers to the first two questions presented should be in the negative.

II. Having developed up to this point and stated what might be regarded as petitioner's major affirmative argument to the effect that *section 148 does not relate to forging an indorsement of a genuine government check,* it is proper to call attention here to the contrary rulings which were relied upon by the Circuit Court of Appeals in this case.

Those cases hold that section 148 penalizes the forging an indorsement of a genuine Government check because "the obligation to pay" does not become complete until the instrument is properly indorsed. Let us consider the history and development of this extraordinary doctrine which (1) ignores the object of the statute to guard against "false paper purporting on

its face to be issued by the Government" (*U. S.* v. *Turner* (1833), 32 U. S. 132, 7 Pet. 132, 8 L. Ed. 633; *U. S.* v. *Howell* (1870), 78 U. S. 432, 11 Wall. 432, 20 L. Ed. 195), and (2) disregards the statutory definition of the word "obligation" in section 147.

The source of this extreme and unwarranted doctrine announced by some Courts is the case of *United States* v. *Jolly* (1888, D. C. Tenn.), 37 Fed. Rep. 108. The indictment in that case was brought under section 5414 of the Revised Statutes (Criminal Code, section 148) for forging an indorsement on the back of a treasury warrant issued from the Post Office Department. No objection was made that the statute referred only to counterfeited treasury warrants, but the accused took the single view that the forgery of an indorsement was not within the scope of said section. District Judge Hammond overruled this objection and said (p. 110):

> "I do not comprehend why the name of the payee is not as much a part of the instrument as that of him who, in behalf of the United States signs the warrant or check. It is conceded that it is so, as appearing on the face of the instrument, but it is denied that it is so when placed on the back of it, because, it is urged that it is then a mere private writing used for a purpose wholly independent of the warrant, and only to pass title to it."

It is to be noted that Jolly's contention is sustained by the ruling of Mr. Justice Washington in the case of *United States* v. *Stewart*, 4 Wash. C. C. 226, wherein it was held:

> "It is perfectly clear, I think, that it (forging the indorsement) does not amount to a forgery

> or alteration of *the bill or note itself*, which is the sole act of the corporation, and contains its promise to pay; whereas the indorsement is the separate act of a person claiming a right to the note."

Judge Hammond ruled otherwise, however, in the case of *Jolly*, and said:

> "The very fact that the warrant is made payable 'to order', rather than 'to bearer', when it would pass by delivery, like a banknote, shows that the practice of so writing them is intended to bring the indorsement within the protection of the law against forgery. It constitutes about all the value there is in so writing them, and the writing the name of the payee falsely and fraudulently on the back is just as much a forgery of the instrument as any other false writing concerning it would be. It is in every legal sense a part of the instrument itself."

Omitting from present consideration the interpretation of the statute as a *forgery* statute instead of a *counterfeiting* statute, we find that here, again, the District Judge does not follow the ruling of Mr. Justice Washington to the effect:

> "That the act did not intend, by the word order, to include an assignment of a bank note, may be fairly presumed from the word check, with which it is associated; the latter meaning in common parlance, a draft payable to bearer, and it was on that account, probably, that the word was added."

The reasons for Judge Hammond's errors are (1) that he regarded section 5414 of the Revised Statutes as a

forgery statute instead of as a counterfeiting statute, and (2) in relying upon the cases of *United States* v. *Long* (1887, C. C. S. D. Ga.), 30 Fed. Rep. 678, and *Ex Parte Hibbs* (1886, D. C. Oregon), 26 Fed. Rep. 421, the District Judge believed those cases to be "*under a statute quite as general as the one we are considering*". In fact, however, those two cases involved section 5463 of the Revised Statutes, Criminal Code, section 218 (title 18 U. S. C. A. sec. 347), which expressly penalized the forging of an indorsement, in this language:

> "Any person who shall, with intent to defraud, * * * forge * * * any order in imitation of or purporting to be a money-order issued by the post office department, or any of its postmasters or agents, or any material signature *or indorsement thereon;* * * * any person who shall, with intent to defraud, pass, utter, or publish * * * as true any such false, forged, or altered money-order, knowing the same, or any signature *or indorsement thereon*, to be false, * * * shall be punished * * *." (Italics ours.)

This section is not "quite as general" as section 5414. Indeed, it is difficult to understand how the District Judge in the *Jolly* case could believe that it was, because the very cases he relied upon quote section 5463, and the words **"or indorsement thereon"** appear twice in each quotation. The failure to distinguish betwen the two sections of the Revised Statutes led to the erroneous conclusion that forging an indorsement was contemplated in section 5414.

This is a noted decision for several reasons: (1) It is the first time such a doctrine was announced in any prosecution under section 5414 (148, U. S. C. C.); (2)

it has been followed by some of the District Courts, and by the Second, Fifth and Ninth Circuits Court of Appeals; and (3) if that rule of law continues to be followed it would write into the section an entirely different and distinct offense than was contemplated by Congress, one which never was intended to be placed there.

And yet we find that the erroneous conclusion of District Judge Hammond is the source of authority in the case of *Hamil* v. *United States* (1924, C. C. A. 5), 298 Fed. Rep. 369, wherein the Court states (p. 371):

> "Section 147 of the Criminal Code includes a check such as is described in the indictment within the definition of an 'obligation or other security of the United States.' We are of opinion that section 148 punishes the forgery of an indorsement of such an obligation or security. The obligation to pay a genuine check does not become complete until it is properly indorsed. The forgery of the indorser's name is as effective a method of defrauding as is the forgery of the name of the drawer of the check."

The essence of this decision is in the sentence wherein the Court speaks of "the obligation to pay" and states that it does not become complete until the check is properly indorsed. Such statement manifests two important errors, because (1) it is a familiar rule of law that the instrument is complete upon delivery, and without indorsement, except when such instrument is drawn to the maker's own order, Uniform Negotiable Instruments Law, section 184; and (2) the Court disregards or overlooks the definition which Congress gave to the word "obligation" as used in section 148, and

applies a new definition which, in effect, writes into section 147 the words "obligation to pay", "a debt", "a duty", or "a responsibility". Such is not the legislative definition nor was it the legislative intent.

An "obligation or other security", as defined in section 147, is a certificate of indebtedness, *Sacks* v. *U. S.* (1921), 257 U. S. 37, 42 S. Ct. 38, 66 L. Ed. 118. It is an *instrument* which contains the "writings" of the Government, issued by the proper officer, under the authority of law, evidencing the pecuniary debt of the Government. *U. S.* v. *Irwin* (1851, C. C. A. 7), 5 McLean 178. Such a *certificate* or *instrument* is complete when it has passed through the required processes of engraving, printing, or writing, as the case may be.

Undoubtedly, "the forgery of the indorser's name is as effective a method of defrauding as is the forgery of the name of the drawer of the check", as stated by the Court in *Hamil's* case, *supra*, and, to the same effect, in *United States* v. *Jolly*, *supra*. But that is not enough to require the Court to hold that the forgery of an indorsement of a genuine Government check is the forging or counterfeiting of an "obligation or security of the United States" within section 148.

It is exceedingly wrong that the petitioner should, by a long train of such conclusions, be reasoned into a penalty, when the express words of section 148 do not authorize it. Penal statutes are not enlarged by intendment, and acts not expressly forbidden by them cannot be reached merely because of their resemblance, or because they may be equally and in the same way "as effective a method of defrauding"; nor can a statute be extended beyond its grammatical sense or natural mean-

ing by any such argument. Sutherland on Statutory Construction, sections 352, 355.

The plain and natural meaning of the words "falsely make, forge, counterfeit", as used in section 148, is to prevent the counterfeiting of government bonds, currency, and other instruments evidencing indebtedness. It is a strained and unwarranted construction of this highly penal statute to hold that a forged indorsement of a *genuine* instrument would fall within its comprehension merely because it is "as effective a method of defrauding". To extend the statute to govern such a state of facts would involve a train of reasoning resulting in new legislation, rather than in the construction of the existing statute. The arguments of the *Hamil* and *Jolly* cases might prevail in a civil case, but they are too indirect and forced for a criminal case.

In *Fasulo* v. *U. S.* (1926), 272 U. S. 620, 47 S. Ct. 200, 71 L. Ed. 443, this Court considered whether the use of the mails for the purpose of obtaining money by means of threats of murder or bodily harm was a scheme to defraud within the meaning of section 215 of the Criminal Code. Mr. Justice Butler delivered the opinion of the Court and held (p. 628, 272 U. S.):

> "Undoubtedly the obtaining of money by threats to injure or kill is more reprehensible than cheat, trick or false pretenses; but that is not enough to require the court to hold that a scheme based on such threats is one to defraud within section 215. While, for the ascertainment of the true meaning and intention of the words relied on regard is to be had to the evils that called forth the enactment and to the rule that a strict construction of penal statutes does not require the words to be so narrowed as to exclude cases that

> fairly may be said to be covered by them, it is not permissible for the court to search for an intention that the words themselves do not suggest. *United States* v. *Wiltberger*, 5 Wheat. 76, 95, 5 L. Ed. 37. * * * There are no constructive offenses; and, before one can be punished it must be shown that his case is plainly within the statute. *United States* v. *Lacher*, 134 U. S. 624, 628, 10 S. Ct. 625, 33 L. Ed. 1080."

In *United States* v. *Chase* (1890), 135 U. S. 255, 10 S. Ct. 756, 34 L. Ed. 117, the indictment was under section 1 of the Act of July 12, 1876, c. 186, 19 Stat. 90, declaring "every * * * book, pamphlet, picture, paper, writing, print, or other publication of an indecent character" to be unmailable, and making their deposit in the mails an offense. The question was whether to send an obscene letter by mail violated that section. This Court said that the letter was not a writing within the meaning of the statute and held (p. 261, 135 U. S.):

> "We recognize the value of the rule of construing statutes with reference to the evil they were designed to suppress as an important aid in ascertaining the meaning of language in them which is ambiguous and equally susceptible of conflicting constructions. But this court has repeatedly held that this rule does not apply to instances which are not embraced in the language employed in the statute, or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress."

And see also:

> *U. S.* v. *Salen* (1914), 235 U. S. 237, 35 S. Ct. 51, 54, 59 L. Ed. 210;

France v. *U. S.* (1897), 164 U. S. 676, 17 S. Ct. 219, 222, 41 L. Ed. 595.

What evils called forth the enactment of the statute involved in the present case and what mischief was it designed to suppress? This Court (or a Justice thereof) has answered these very questions more than once. In *United States* v. *Turner* (1833), 32 U. S. 132, 7 Pet. 132, 8 L. Ed. 633, the answer was: *"It is intended to guard the public from false and counterfeit paper purporting on its face to be issued by the bank" (of the United States).* In *United States* v. *Stewart* (1818), 4 Wash. C. C. 226 (Fed. Cases No. 16402), Mr. Justice Washington answered: *"the Act* (of 1816) *did not intend, by the word order, to include an assignment"* and that *"the indorsement is not an offense within the Act."* Again, in *U. S.* v. *Howell* (1870), 78 U. S. 432, 11 Wall 432, 20 L. Ed. 195, Mr. Justice Miller of this Court held: *"The purpose of the Act was to punish the making of counterfeits of the notes or bonds described in the statute."* And finally, in *Dunbar* v. *U. S.* (1895), 156 U. S. 185, 190, 15 S. Ct. 325, 328, 39 L. Ed. 390, this Court held that the purpose of section 5431, Revised Statutes (Criminal Code, section 151) was *"the protection of the bonds or currency of the United States and not the punishment of any fraud or wrong upon individuals."*

In the light of such authoritative rulings, the decisions in the *Jolly* and *Hamil* cases, and by the Court below in the present case, are unsound and should not prevail.

III. The indictment fails to inform the accused exactly of what he is charged. It lacks that precision and certainty of description which would enable him to always use a judgment upon it as a bar to any other prosecution.

That, as we all know, is the substantial purpose of a written charge. *Potter* v. *United States* (1894), 155 U. S. 438, 39 L. Ed. 44, 15 S. Ct. 144, 146.

Does the present indictment fulfill its substantial purpose? It charges that the accused did "falsely make, forge and alter a certain obligation of the United States". This statement lacks certainty of description unless the words "falsely make, forge, and alter" mean that the accused "altered" an obligation issued by the Government. Otherwise, this general charge is impossible of performance with respect to "a certain obligation", because a "forged" instrument is one which was never issued by the Government. But whether or not that is agreed to, we think it will be admitted that the general description of the offense is insufficient unless the "certain obligation of the United States" afterwards alleged, is a bond, a draft, a check, or other instrument described and enumerated in section 147 of the Criminal Code.

The following description is given of said "obligation", to wit: "the *indorsement* on a draft" for $9,044.37. What does this mean, and is there any precision or certainty of description which would enable the accused to always use a judgment here as a bar to any other prosecution? No one will seriously contend that an *indorsement* is a certificate of the Government's indebtedness. It is only a means of transfer. To "falsely make, forge,

and alter" an obligation is to counterfeit, and is an offense against the currency of the United States; whereas to "falsely make, forge, or alter" an indorsement thereon is not counterfeiting but is an offense against the operations of the Government.

The indictment then alleges the offense to have been committed "in the following manner, that is to say: that heretofore a certain draft for the payment of money", $9,044.37, "was drawn by an authorized officer of the United States, to wit: by one J. L. Summer, Disbursing Clerk of the United States Treasury, upon the Treasurer of the United States, to the order of Malcolm S. Mackay, Admr. Est. of Jennie E. Mackay, which said draft was an obligation of the United States." Then follows a description of the draft, and the indorsements on the back thereof.

It is reasonably clear from such allegations that the said draft was drawn by one authorized Government office upon another and contained the words and figures on its face and on the back, as is described. This "said draft for money", it is charged, "was *duly issued* to the said Malcolm S. Mackay." If this be true, then the "obligation" was not "falsely made or forged" as was first alleged, because a "forged obligation" is one which only purports on its face to be genuine.

The indictment concludes, "*that the said draft for money with the forged endorsement thereon did constitute together a forged obligation of the United States.*" It is to be noted that the counterfeited obligation is no longer the indorsement, as was first charged, nor is it the draft for money. It has now become the genuine draft which was "duly issued" plus the indorsement. A mere averment of the indictment has transformed two sepa-

rate "obligations of the United States" into one single instrument!

The government brief submitted to the Court below contained the statement that "the pleader, in drafting this indictment, had in mind the objection which the Circuit Court of Appeals, for the Fifth Circuit, pointed out in *De Lemos* v. *U. S.* (1899, C. C. A. 5), 91 Fed. 497." In that case, the Court held that the three counts of the indictment were fatally defective, because it was alleged that the draft itself was forged, and that a subsequent allegation that the forgery consisted in the false making of the indorsement was repugnant. The essence of the decision was that there is a clear distinction between alleging a draft to be forged and alleging an indorsement of a genuine draft to be forged. We think this distinction sound and conformable to the fundamental principles of criminal pleading.

The pleader of the present indictment did not, however, keep said distinction in mind, because he charged (1) at the outset that the obligation which was forged was an *indorsement*, whereas, (2) at the conclusion of said indictment, the obligation which was forged was the draft, because a forged indorsement was placed on the back thereof. *Which, then, is the forged obligation?*

The Court, in the *De Lemos* case, expressed the opinion that a charge could have been laid in that case under section 5421 of the Revised Statutes (now Criminal Code, section 29), and with this opinion we entirely agree. But the Court, while sustaining the demurrer to the indictment, expressed the opinion, by way of dictum, that a charge could have been laid for forgery under section 5414 of the Revised Statutes if the pleader had "distinctly charged that the genuine draft, with the forged

indorsement upon it, constitute together a forged obligation of the United States."

This view was overruled at a much later date in the case of *Gesell* v. *United States* (1924, C. C. A. 8), 1 Fed. (2d) 283, wherein the Court referred to said statement in the *De Lemos* case, and held (p. 288):

> "Now, of course, if by mere assertion or averment the assignment, which before was no part of the draft, could be made a part of that instrument, then the charge could be laid under section 5414, Rev. Stats. U. S. (now Criminal Code, Sec. 148), and by parity of reasoning in the present case the charge could be laid under Criminal Code, Sec. 151. But this all assumes the identity of the original complete obligation and the independent assignment thereof. We think this was not the intention of the Congress when it framed these three sections, each so well adapted to fill its peculiar niche, and, when taken together, so inclusive of the field under consideration, and especially in view of section 5413, Rev. Stats. U. S. (now Criminal Code, Sec. 147), which so clearly and precisely defines and enumerates the particular instruments which the words 'obligation or other security of the United States', then being considered, 'shall be held to mean'."

The Court stated that a charge of forging an indorsement on a genuine obligation "could and should have been laid under" section 29 (title 18 U. S. C. A. Sec. 73), which, so far as here applicable, provides:

> "Whoever shall falsely make, alter, forge, or counterfeit, * * * any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or

> of enabling any other person, either directly or indirectly, to obtain or receive from the United States, or any of their officers or agents, any sum of money; * * * shall be fined not more than one thousand dollars and imprisoned not more than ten years."

The Court, in *Gesell's* case, after setting forth said section in full, stated as follows (p. 288):

> "Now had the pleader charged that the said Howard E. Gesell and the said Nels B. Nelson having obtained possession of a genuine obligation of the United States, to wit, a registered convertible gold note, etc., did falsely forge an order, contract and other writing on the back thereof, to wit, the words (setting out the forged instrument), for the purpose of obtaining, receiving and enabling any other person to obtain or receive from the United States, etc., a sum of money, etc., * * * certainly a charge would have been laid under said section 29, * * *."

The pleader, in the present case, could have avoided the repugnant allegations in the indictment if he had not charged the accused with "forging an obligation of the United States". The obligation described in said indictment was a genuine draft for money; it was neither falsely made, "forged", nor altered.

In the later case of *Lewis* v. *United States* (1925, C. C. A. 8), 8 Fed. (2d) 849, the Court, after discussing and approving of the decision in the *Gesell* case, said (p. 850):

> "In further support of our conclusion that sections 148 and 151 cannot be invoked in the case at bar, reference is made to the language

> of the Supreme Court in *Dunbar* v. *U. S.* (*supra*), wherein it is said that former section 5431, now section 151 of the Criminal Code, had for its purpose 'the protection of the bonds or currency of the United States, and not the punishment of any fraud or wrong upon individuals'."

Further authority for the soundness of the reasoning in the *Gesell* and *Lewis* cases is to be found in *White* v. *Levine* (1930, C. C. A. 10), 40 Fed. (2d) 502, the most recent case in point. There, an indictment charging the accused with forging the payee's name on a United States Veteran's Bureau compensation check was held to be, "necessarily for an offense under section 29 of the Penal Code", because sections 148 and 151 "do not embrace forgery of an indorsement on an obligation of the government". The Court held (p. 503):

> "The indictment was necessarily for an offense under section 29 of the Penal Code, now section 73 of title 18 of the U. S. Code (18 U. S. C. A. Sec. 73), as the two sections 148 and 151 of the Penal Code, sections 262 and 265 of title 18 of the U. S. Code (18 U. S. C. A., secs. 262, 265), do not embrace forgery of an indorsement on an obligation of the government. The question has been raised and decided in *Gesell* v. *United States* (C. C. A.), 1 F. (2d), 283, and *Lewis* v. *United States* (C. C. A.), 8 F. (2d) 849. *It is our opinion that those cases are sound and should prevail over the decisions cited which hold to the contrary.*" (Italics ours.)

In the case of *United States* v. *Albert* (1891, C. C. Fla.), 45 Fed. Rep. 552 (erroneously relied upon below as authority in the Government Brief), the Court considered an indictment, the second count of which was

substantially like the present one. The contention was there made that no Federal statute penalized the forgery of an indorsement upon a pension check. The conclusion of the Court, after a review of some cases, was this (p. 557):

> "It seems to us that section 5421 is the section under which the defendant in this case should have been prosecuted for the matters contained in the second count of the indictment. However that may be, we conclude that the said second count charges that the issuance of a genuine order for the sum of $45 made and signed by M. A. Mulligan, United States pension agent, whereby the assistant treasurer of the United States at Chicago, Ill., was required and directed to pay to the order of William H. Chaddock the aforesaid sum of $45; that the aforesaid order was afterwards falsely and fraudulently altered and forged by the name of the said William H. Chaddock being falsely and fraudulently placed thereon, as his indorsement; and that afterwards, to-wit, the said Albert did utter and publish the same; *and that this count cannot be sustained under Section 5431* (Criminal Code, section 151), *because it does not sufficiently describe any falsely made, counterfeited, or altered obligation or other security of the United States.* * * * The said count is undoubtedly deficient in other respects, and is open to criticism for vagueness, uncertainty, and repugnancy." (Italics ours.)

(The statute punishing the forging of an indorsement upon pension checks was not enacted until August 17, 1912. 38 U. S. C. A. 128.)

The present indictment contains more defects than

found in any of the cases cited, in all of which, demurrers were sustained. We may summarize the allegations in this indictment as follows:

(a) Prussian counterfeited an "obligation of the United States".

(b) The "obligation" which he counterfeited was an indorsement upon a draft.

(c) The said draft was an "obligation of the United States", and was "duly issued".

(d) Prussian forged Mackay's name on the back thereof.

(e) The said draft was not a counterfeited obligation; neither was the indorsement alone a counterfeited obligation; but, both together, they constituted a "forged obligation of the United States"—even though it was "duly issued"—**"as the defendant well knew".**

The pleader was at liberty to use any form of expression, but that is subject to the limitation that he fully and clearly describe the offense; and the entire indictment is to be considered in determining whether the offense is fully and clearly stated. *Dunbar* v. *U. S.*, *supra*.

The indictment does not fulfill the substantial purpose of a written charge because it fails to inform the accused exactly of what he is charged. It lacks precision and certainty of description which would enable petitioner to always use the judgment upon it as a bar to any other prosecution. It is therefore submitted that the third question presented should be answered in the negative.

This argument having now been completed, and the same having been limited to the question whether the indictment states an offense under the Criminal Code, as specified by this Honorable Court in the order allowing certiorari, the same is respectfully submitted to the Court for consideration.

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With Him on the Brief.

APPENDIX.

CITATIONS OF STATE STATUTES

ALABAMA

Counterfeiting: Alabama Code of 1928, Sect. 4120.
Forgery: Alabama Code of 1928, Sect. 4121.

ARIZONA

Counterfeiting: Revised Code of Arizona (Struckmeyer), 1928, Sects. 4752-4754.
Forgery: Revised Code of Arizona (Struckmeyer), 1928, Sect. 4750.

ARKANSAS

Counterfeiting: Arkansas Digest of the Statutes (Crawford & Moses), 1919, Sects. 2466-2469.
Forgery: Arkansas Digest of the Statutes (Crawford & Moses), 1919, Sect. 2460.

CALIFORNIA

Counterfeiting: Penal Code of California (Deering), 1923, Sects. 475, 476, 480.
Forgery: Penal Code of California (Deering), 1923, Sect. 470.

COLORADO

Counterfeiting: Courtright's Mills Annotated Statutes (Colo.), 1930, Vol. 2, Sect. 1835.
Forgery: Courtright's Mills Annotated Statutes (Colo.), 1930, Vol. 2, Sect. 1832.

CONNECTICUT

Counterfeiting: General Statutes of Conn., Revision of 1930, Vol. II, Sect. 6360.
Forgery: General Statutes of Conn., Revision of 1930, Vol. II, Sect. 6358.

DELAWARE

Counterfeiting:	Delaware Revised Statutes, 1915, Sects. 4771, 4772.
Forgery:	Delaware Revised Statutes, 1915, Sect. 4773.

FLORIDA

Counterfeiting:	Compiled General Laws of Florida, 1927, Vol. 4, Sects. 7332-7334, 7343.
Forgery:	Compiled General Laws of Florida, 1927, Vol. 4, Sect. 7324.

GEORGIA

Counterfeiting:	Georgia Code, 1926, p. 1948 (Penal Code, Secs. 238-241).
Forgery:	Georgia Code, 1926, p. 1947 (Penal Code, Sect. 231).

IDAHO

Counterfeiting:	Idaho Compiled Statutes, 1919, Vol. 2, Sects. 8413, 8414.
Forgery:	Idaho Compiled Statutes, 1919, Vol. 2, Sects. 8408.

ILLINOIS

Counterfeiting:	Smith-Hurd Illinois Revised Statutes, 1929, Sects. 279, 285.
Forgery:	Smith-Hurd Illinois Revised Statutes, 1929, Sect. 277, p. 1003.

INDIANA

Counterfeiting:	Burns Annotated Indiana Statutes (Watson's Revision), 1926, Vol. 1, Sects. 2957-2961.

Forgery: Burns Annotated Indiana Statutes (Watson's Revision), 1926, Vol. 1, Sect. 2946.

IOWA

Counterfeiting: Code of Iowa, 1927, Sects. 13142, 13143, 13151, 13152.

Forgery: Code of Iowa, 1927, Sect. 13139.

KANSAS

Counterfeiting: Revised Statutes of Kansas, 1923, Chs. 21, 608-612, pp. 375, 376.

Forgery: Revised Statutes of Kansas, 1923, Chs. 21, 602, p. 375.

KENTUCKY

Counterfeiting: Carroll's Kentucky Statutes (Baldwin's Revision), 1930, Sects. 1192, 1193.

Forgery: Carroll's Kentucky Statutes (Baldwin's Revision), 1930, Sect. 1185.

LOUISIANA

Counterfeiting: Marr's Annotated Revised Statutes of Louisiana, 1915, Vol. 1, pp. 593-595 (Rev. Stat. 834-840).

Forgery: Louisiana Statutes (Marr's Annotated Revision), Supplement, 1916-24, p. 367 (Rev. Stat. 833).

MAINE

Counterfeiting: Revised Statutes of Maine, 1930, p. 1560 (Ch. 132, Sects. 2, 6, 7).

Forgery: Revised Statutes of Maine, 1930, p. 1559 (Ch. 132, Sect. 1).

MARYLAND

Counterfeiting: Annotated Code of Maryland (Bagby), 1924, Vol. 1, pp. 986, 987 ("Crimes & Punishments", Sects. 49, 50).

Forgery: Annotated Code of Maryland (Bagby), 1924, Vol. 1, p. 985 ("Crimes & Punishments", Sect. 44).

MASSACHUSETTS

Counterfeiting: Mass. General Laws, 1921, Vol. 2, p. 2730 (Ch. 267, Sects. 12, 13).

Forgery: Mass. General Laws, 1921, Vol. 2, p. 2728 (Ch. 267, Sect. 1).

MICHIGAN

Counterfeiting: Mich. Compiled Laws of 1915, Vol. 3, Sects. 15435-15440 (Ch. 258, Sects. 4-9).

Forgery: Mich. Compiled Laws of 1915, Vol. 3, Sect. 15432 (Ch. 258, Sect. 1).

MINNESOTA

Counterfeiting: Mason's Minnesota Statutes, 1927, Vol. 2, Sects. 10321, 10325, 10341.

Forgery: Mason's Minnesota Statutes, 1927, Vol. 2, Sect. 10322.

MISSISSIPPI

Counterfeiting: Mississippi Code, 1930, Vol. 1, Sects. 941-943.

Forgery: Mississippi Code, 1930, Vol. 1, Sect. 932.

MISSOURI

Counterfeiting: Missouri Revised Statutes, 1919, Vol. 1, Sects. 3431, 3432.

Forgery: Missouri Revised Statutes, 1919, Vol. 1, Sect. 3422.

MONTANA

Counterfeiting: Montana Revised Codes, 1921, Vol. 4, Sects. 11360, 11361, 11365.

Forgery: Montana Revised Codes, 1921, Vol. 4, Sect. 11355.

NEBRASKA

Counterfeiting: Nebraska Compiled Statutes, 1922, Sects. 9685, 9686.

Forgery: Nebraska Revised Statutes, 1922, Sect. 9683.

NEVADA

Counterfeiting: Revised Laws of Nevada, 1912, Vol. 2, Sect. 6665.

Forgery: Revised Laws of Nevada, 1912, Vol. 2, Sect. 6663.

NEW HAMPSHIRE

Counterfeiting: Public Laws of New Hampshire, 1926, Vol. 2, p. 1502 (Ch. 388, Sects. 4-6).

Forgery: Public Laws of New Hampshire, 1926, Vol. 2, p. 1502 (Ch. 388, Sect. 1).

NEW JERSEY

Counterfeiting: N. J. Compiled Statutes, 1709-1910, Vol. 2, p. 1801 ("Crimes", Sect. 188).

Forgery: N. J. Compiled Statutes, 1709-1910, Vol. 2, p. 1803 ("Crimes", Sect. 197).

New Mexico

Counterfeiting:	New Mexico Statutes, 1929, Sects. 35-2304, 2305, 2309, 2310.
Forgery:	New Mexico Statutes, 1929, Sect. 35-2301.

New York

Counterfeiting:	Consolidated Laws of N. Y. (McKinney), 1917, Vol. 39 (Penal Code, Sect. 887, subd. 3).
Forgery:	Consolidated Laws of N. Y. (McKinney), 1917, Vol. 39 (Penal Code, Sect. 884).

North Carolina

Counterfeiting:	North Carolina Code, 1927, Sect. 4293.
Forgery:	North Carolina Code, 1927, Sect. 4296.

North Dakota

Counterfeiting:	North Dakota Compiled Laws, 1914, Vol. 2, Sects. 9888-9891.
Forgery:	North Dakota Compiled Laws, 1914, Vol. 2, Sect. 9883.

Ohio

Counterfeiting:	Throckmorton's Annotated Code of Ohio, 1929, Sects. 13096-13101.
Forgery:	Throckmorton's Annotated Code of Ohio, 1929, Sect. 13083.

Oklahoma

Counterfeiting:	Compiled Oklahoma Statutes, 1921, Vol. 1, Sects. 2076, 2077.
Forgery:	Compiled Oklahoma Statutes, 1921, Vol. 1, Sects. 2071.

OREGON

Counterfeiting:	Oregon Laws, 1920, Vol. 1, Sects. 1997-2000.
Forgery:	Oregon Laws, 1920, Vol. 1, Sect. 1996.

PENNSYLVANIA

Counterfeiting:	Purdon's Penna. Statutes, 1930, Title 18, Sects. 3611, 3612.
Forgery:	Purdon's Penna. Statutes, 1930, Title 18, Sect. 3631.

RHODE ISLAND

Counterfeiting:	Rhode Island General Laws, Revision of 1923, Part 2, p. 1715 (Chap. 398, Sects. 2-5).
Forgery:	Rhode Island General Laws Revision of 1923, Part 2, p. 1714 (Chap. 398, Sect. 1).

SOUTH CAROLINA

Counterfeiting:	Code of Laws of South Carolina, 1922, Vol. 2, Sect. 454, 455.
Forgery:	Code of Laws of South Carolina, 1922, Vol. 2, Sect. 99.

SOUTH DAKOTA

Counterfeiting:	Compiled Laws South Dakota, 1929, Vol. 1, Sects. 4185, 4186.
Forgery:	Compiled Laws South Dakota, 1929, Vol. 1, Sect. 4180.

TENNESSEE

Counterfeiting:	Tennessee Annotated Code (Shannon), 1918, Vol. 5, Sect. 6598.

Forgery: Tennessee Annotated Code (Shannon), 1918, Vol. 5, Sect. 6596.

TEXAS

Counterfeiting: Vernon's Annotated Criminal Statutes of the State of Texas, 1925, Vol. 2, p. 170 (Penal Code, Arts. 981-983).

Forgery: Vernon's Annotated Criminal Statutes of the State of Texas, 1925, Vol. 2, p. 174 (Penal Code, Art. 992).

UTAH

Counterfeiting: Compiled Laws of Utah, 1917, Vol. 2, Sects. 8275, 8276, 8280.

Forgery: Compiled Laws of Utah, 1917, Vol. 2, Sect. 8270.

VERMONT

Counterfeiting: General Laws of Vermont, 1917, Sect. 6905.

Forgery: General Laws of Vermont, 1917, Sect. 6902.

VIRGINIA

Counterfeiting: Virginia Code of 1930, Sects. 4487, 4488.

Forgery: Virginia Code of 1930, Sect. 4489.

WASHINGTON

Counterfeiting: Remington's Compiled Statutes of Washington, 1922, Vol. 1, Sects. 2588, 2590, 2591.

Forgery: Remington's Compiled Statutes of Washington, 1922, Vol. 1, Sect. 2588.

West Virginia

Counterfeiting:	Official Code of West Virginia, 1931, p. 1477 (Crimes, Art. 4, Sects. 3, 4, 6).
Forgery:	Official Code of West Virginia, 1931, p. 1477 (Crimes, Art. 4, Sec. 5).

Wisconsin

Counterfeiting:	Wisconsin Statutes, 1929, Vol. 2, Sects. 343-58.
Forgery:	Wisconsin Statutes, 1929, Vol. 2, Sects. 343-56.

Wyoming

Counterfeiting:	Wyoming Compiled Statutes, 1920, Sect. 7287.
Forgery:	Wyoming Compiled Statutes, 1920, Sect. 7284.

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No. 448

In the Supreme Court of the United States

OCTOBER TERM, 1930

AARON PRUSSIAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 448

AARON PRUSSIAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The United States does not oppose the granting of the petition in this case, but suggests that the Court limit its review to the question stated below.

OPINIONS BELOW

The charge of the trial court to the jury appears at pages 124–128 of the Record. The opinion of the Circuit Court of Appeals (R. 148) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 7, 1930. (R. 151–152.) The petition for certiorari was filed September 11, 1930. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

We suggest that the Court limit its review to the following question:

Whether the indictment in the instant case, which charged the petitioner with forging by endorsement the name of the payee of a Government draft, states an offense under the Criminal Code.

The petitioner raises other questions which are considered below, but we submit that if petitioner is in a position to urge them here they are not of sufficient importance to warrant review by this Court.

STATUTES INVOLVED

Section 147 of the Criminal Code (U. S. C., Title 18, Sec. 261) provides in part as follows:

> The words "obligation or other security of the United States" shall be held to mean all * * * checks, or drafts for money drawn by or upon authorized officers of the United States * * *.

Section 148 of the Criminal Code (U. S. C., Title 18, Sec. 262) provides:

> Whoever, with intent to defraud, shall falsely make, forge, counterfeit, or alter any obligation or other security of the United States shall be fined not more than $5,000 and imprisoned not more than fifteen years.

Section 29 of the Criminal Code (U. S. C., Title 18, Sec. 73) provides in part as follows:

> Whoever shall falsely make, alter, forge, or counterfeit * * * any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving * * * from the United States, or any of their officers or agents, any sum of money * * * shall be fined not more than one thousand dollars and imprisoned not more than ten years.

STATEMENT

Petitioner, an attorney at law, was convicted on the first count of an indictment which charged him with forging by way of endorsement the name of the payee of a Government draft for $9,044.37, given as a refund of Federal income taxes. The payee was petitioner's client. (R. 9–11, 128.)

The face of the draft and also the reverse side thereof, with its several endorsements, are set forth verbatim in the body of the count.

The District Court sentenced petitioner to pay a fine of $200 and to serve five years in the penitentiary. (R. 129.) Its judgment was affirmed by the Circuit Court of Appeals for the Second Circuit. (R. 152.)

The evidence is sufficiently summarized for present purposes in the opinion of the Circuit Court of Appeals (R. 148–150), to which reference is made.

DISCUSSION

By a motion to dismiss made before trial, by a similar motion made after the close of the Govern-

ment's case, and by a motion in arrest of judgment, petitioner raised the question in the trial court whether an indictment which charges the forging of an endorsement upon a Government draft states an offense under the Criminal Code. (R. 15, 16, 81, 67–83, 129.) The trial court upheld the sufficiency of the indictment. Its ruling was approved by the Circuit Court of Appeals on the ground that the indictment stated an offense under Section 148 of the Criminal Code. The decision of the Circuit Court of Appeals is in accord with those of the Circuit Court of Appeals for the Fifth Circuit in *Hamil* v. *United States,* 298 Fed. 369, and the Circuit Court of Appeals for the Ninth Circuit in *Alvarado* v. *United States,* 9 F. (2d) 385. See also *DeLemos* v. *United States,* 91 Fed. 497 (C. C. A. 5th). But the Circuit Court of Appeals for the Eighth Circuit in *Gesell* v. *United States,* 1 F. (2d) 283, and *Lewis* v. *United States,* 8 F. (2d) 849, has held that Section 148 does not cover forgery of an endorsement upon a Government obligation. See also *White, Warden,* v. *Levine,* 40 F. (2d) 502 (C. C. A. 10th). Because of these conflicting decisions, we do not oppose a review on this point.

The indictment alleges that the forgery constituted a violation not only of Section 148 of the Criminal Code, *supra,* p. 2, but of Section 29 of that Code, *supra,* p. 3. (R. 12.) The application of Section 29 is also a doubtful question which remains in the case.

Other questions discussed in the petition for certiorari relate to petitioner's belief that he had authority to endorse his client's name on the refund check and to the intent of the parties in executing a power of attorney which gave the petitioner power to receive but *"not to endorse"* any checks given by the Government as a refund of the taxes petitioner was seeking to recover. Petitioner's evidence as to these issues was submitted to the jury in a charge which was as favorable to the petitioner as he could have expected (R. 124–127), and it would seem, as the Circuit Court of Appeals has said (R. 151), that the petitioner is not now in a position to reverse the adverse finding of the jury on these issues. In any event, we do not believe that these questions are of sufficient importance to warrant consideration by this Court. It is accordingly suggested that the Court limit its review to the question whether the indictment states an offense under the Criminal Code.

Respectfully submitted.

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OCTOBER, 1930.

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OCTOBER TERM, 1930

AARON PRUSSIAN, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 448

AARON PRUSSIAN, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The charge of the trial court to the jury appears at pages 89–92 of the Record. The opinion of the Circuit Court of Appeals (R. 104) is reported in 42 F. (2d) 854.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 7, 1930. (R. 107.) The petition for certiorari was filed September 11, 1930, and granted October 20, 1930. (R. 108.) The jurisdiction of this Court rests upon Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In its order granting the writ of certiorari, the Court directed that "the briefs and argument * * * be limited to the question whether the indictment states an offense under the criminal code." (R. 108.)

In discussing this question the Government contends—

(1) That the indictment states an offense under Section 148 of the Criminal Code;

(2) That it states an offense under Section 29 of the Criminal Code.

STATUTES INVOLVED

These are printed in the Appendix, pp. 18–19, *infra*.

STATEMENT

The petitioner was convicted in the District Court for the Eastern District of New York on the first count of an indictment which charged him with forging by way of endorsement the name of the payee of a Government draft for $9,044.37, given as a refund of Federal income taxes. (R. 5–7, 93.) He was sentenced to pay a fine of $200 and to serve five years in the penitentiary. (R. 94.) The judgment was affirmed by the Circuit Court of Appeals for the Second Circuit. (R. 107.)

The indictment alleges (R. 5–6) that the defendant did—

> unlawfully, wilfully, knowingly and feloniously, falsely make, forge and alter a certain

obligation of the United States, to wit: the endorsement on a draft for payment of money, for the purpose of obtaining and receiving from the Treasurer of the United States, a sum of money, to wit: Nine thousand forty-four dollars and thirty-seven cents ($9,044.37) * * * [here follows a copy of the draft and endorsement] by falsely making and forging the name of the payee, to wit: the words "Malcolm S. Mackay" on the back of said draft for money; that the said draft for money with the said forged endorsement thereon did together constitute a forged obligation of the United States as the defendant then and there well knew, with intent then and there and thereby to defraud, in violation of Title 18, United States Code, Sections 73 and 262; (Sections 29 and 148, U. S. C. C.).

SUMMARY OF ARGUMENT

The indictment states an offense under Section 148 of the Criminal Code, which provides that "Whoever, with intent to defraud, shall falsely make, forge, counterfeit, or alter any obligation or other security of the United States shall be fined * * *." The words "obligation or other security of the United States" are defined by Section 147 of the Criminal Code as including "checks, or drafts for money drawn by or upon authorized officers of the United States." The draft involved in the instant case is admitted by petitioner to be an "obli-

gation or other security of the United States." It was drawn on a form approved by the Comptroller of the Treasury and was payable "to order." On the back of the check was a direction requiring it to be endorsed by the person in whose favor it was drawn. Although there is a direct conflict of authority as to whether an endorsement on a draft of the Government comes within the provisions of Section 148, we submit that the sounder view is that of the courts which hold that it does.

The indictment also states an offense under Section 29 of the Criminal Code, which provides: "Whoever shall falsely make, alter, forge, or counterfeit * * * any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving * * * from the United States, or any of their officers or agents, any sum of money * * * shall be fined * * *." The indictment here alleges that the petitioner forged an endorsement "for the purpose of obtaining and receiving from the Treasurer of the United States, a sum of money * * * with intent then and there and thereby to defraud" in violation of Section 29 of the Criminal Code. We submit that the only doubtful question is whether an endorsement on a check is an "order * * * or other writing" within the meaning of this section. Many cases in the lower courts have held that it is, although some courts have reached the contrary conclusion.

ARGUMENT

I

THE INDICTMENT STATES AN OFFENSE UNDER SECTION 148 OF THE CRIMINAL CODE

The Circuit Court of Appeals so held in the instant case.

Section 148 of the Criminal Code (p. 18, *infra*) provides that "Whoever, with intent to defraud, shall falsely make, forge, counterfeit, or alter any obligation or other security of the United States shall be fined," etc. The words "obligation or other security of the United States" are defined in Section 147 of the Criminal Code (p. 18, *infra*) as including "checks, or drafts for money, drawn by or upon authorized officers of the United States."

The draft involved in the instant case is admitted by petitioner to be an "obligation or other security of the United States." (Br. p. 3.)

Sections 147 and 148 were originally enacted as Sections 10 and 13 of the Act of June 30, 1864, c. 172, 13 Stat. 218, 221, 222. Section 10 covered not only the forging of obligations and securities of the United States but also the passing, uttering, publishing, etc., of such obligations and securities. The forgery portion of the section was carried into the Revised Statutes as Section 5414. Section 13, defining the words "obligation or other security of the United States," became Section 5413 of the Revised Statutes. Section 5413 was incorporated into the

Criminal Code as Section 147, and Section 5414 as Section 148, without material change.

No case presenting the question whether forgery of an endorsement upon a Government obligation constituted forgery of the obligation itself appears to have arisen under the statute until 1888. In that year in *United States* v. *Jolly,* 37 Fed. 108, which involved the forgery of the endorsement of a payee's name upon a post-office warrant, the District Court for the Western District of Tennessee held that such a forgery constituted a violation of Section 5414 of the Revised Statutes. The court said (p. 110):

> The next objection is that the indictment is only for the forgery of an *indorsement* upon the post-office warrant, which is not within the Revised Statutes, § 5414, but is at most only a common-law or state offense, of which this court has no jurisdiction. This is a very narrow view of the statute, and trims it to dimensions that would very materially impair its usefulness, and leave the obligations and securities of the United States at the mercy of forgers and counterfeiters. I do not comprehend why the name of the payee is not as much a part of the instrument as that of him who, in behalf of the United States, signs the warrant or check. It is conceded that it is so, as appearing on the face of the instrument, but it is denied that it so when placed on the back of it, because, it is urged that it is then a mere private writing used for a purpose wholly independ-

> ent of the warrant, and only to pass title to it; and that it is no more forgery than it would be to hand the warrant over to another, if it were payable to bearer, as it might be, and pass it by mere delivery. * * * The very fact that the warrant is made payable "to order," rather than "to bearer," when it would pass by delivery, like a bank-note, shows that the practice of so writing them is intended to bring the indorsement within the protection of the law against forgery. It constitutes about all the value there is in so writing them, and the writing the name of the payee falsely and fraudulently on the back is just as much a forgery of the instrument as any other false writing concerning it would be. It is in every legal sense a part of the instrument itself.

This decision has been followed by the Circuit Court of Appeals for the Fifth Circuit in *De Lemos* v. *United States*, 91 Fed. 497, and *Hamil* v. *United States*, 298 Fed. 369, 371, and by the Circuit Court of Appeals for the Ninth Circuit in *Alvarado* v. *United States*, 9 F. (2d) 385, 386. The *De Lemos* case involved Section 5414 of the Revised Statutes and the two later decisions involved Section 148 of the Criminal Code.

Opposed to this line of decisions are two cases decided by the Circuit Court of Appeals for the Eighth Circuit, *Gesell* v. *United States*, 1 F. (2d) 283, 288, and *Lewis* v. *United States*, 8 F. (2d) 849,

and a case decided by the Circuit Court of Appeals for the Tenth Circuit, *White* v. *Levine*, 40 F. (2d) 502. See also *United States* v. *Albert*, 45 Fed. 552 (C. C. N. D. Fla.) The *ratio decidendi* in these cases is that the indorsement forms no part of the "obligation."

We submit that the sounder view is that expressed in the group of cases first cited. It is noteworthy that here the draft was payable "to the order of" Malcolm S. Mackay and that on the back of the draft as issued appeared a form approved by the Comptroller of the Treasury, which stated: "This check must be indorsed in ink or indelible pencil on the line below by the person in whose favor it is drawn." (R. 6.) Consequently, indorsement by the payee was a condition precedent to the obligation of the Government to pay the draft, and the genuine signature of the payee was as necessary as was the signature of the disbursing officer. If the Government paid the draft in reliance on a forged indorsement it would still be liable to make payment of the amount in question to the payee.

In an endeavor to show that the word "forgery" in Section 148 should be construed merely to mean "counterfeiting"—i. e., the unlawful imitation of a genuine instrument—petitioner devotes a substantial portion of his brief to a discussion of statutes antedating the Act of 1864. Most of these statutes were enacted in connection with the issue of particular securities, and generally contained

a provision punishing any making, forging, or counterfeiting thereof "*in imitation of*" the particular instruments referred to. There are no such limiting words in Section 148. That statute is broad and comprehensive, referring generally to all "obligations and securities of the United States." *United States* v. *Owens,* 37 Fed. 112, 113 (C. C., W. D. Tenn.).

We submit that the language of Section 148 shows that Congress was dealing not only with fictitious but also with genuine instruments. While criminal statutes are to be strictly construed, that rule "is not violated by allowing their words to have full meaning, or even the more extended of two meanings, where such construction best harmonizes with the context, and most fully promotes the policy and objects of the legislature." *Ash Sheep Co.* v. *United States,* 252 U. S. 159, 170. Forgery of a payee's endorsement "is as effective a method of defrauding as is the forgery of the name of the drawer" of the instrument. *Hamil* v. *United States, supra.*

The only case decided in connection with the early statutes cited by the petitioner having any direct bearing on the question involved herein is *United States* v. *Stewart,* Fed. Cas. No. 16402 (C. C., Pa.). That case involved the forgery of an endorsement on a note subsequent to that of the payee and arose under Section 18 of the Act of April 10, 1816, c. 44, 3 Stat. 266, 275, which punished the false making, forging, or counterfeiting of any bill or

note "in imitation of or purporting to be a bill or note issued by order of the president, directors and company" of the Bank of the United States, "or of any order or check on the said bank or corporation," and also "altering" any such instrument. While there are expressions in the opinion which are unfavorable to the Government's position herein, the question chiefly discussed was whether the endorsement constituted an "order" on the bank within the meaning of the statute. The court held that it did not, construing the word "order" as having the same meaning as the word "check," with which it was associated in the Act.

Petitioner refers also to several special statutes which punish the forgery of endorsements on specific classes of instruments, which have been enacted since Section 148 of the Criminal Code or the statutes from which it was derived. (Brief, pp. 20–22.) He argues that these statutes show that Congress must have understood that Section 148 did not cover the forging of "endorsements" on such instruments. The statutes in question were parts of legislation dealing comprehensively with particular subjects. (See Act of August 17, 1912, c. 301, 37 Stat. 311; Act of June 8, 1872, c. 335, 17 Stat. 283, 297–300, Section 116 of which subsequently became Section 218 of the Criminal Code.) Petitioner's argument ignores the well-recognized fact that Congress, in legislating with respect to particular subjects, frequently duplicates offenses which are covered by more general legislation.

II

THE INDICTMENT STATES AN OFFENSE UNDER SECTION 29 OF THE CRIMINAL CODE

Section 29 of the Criminal Code provides (pp. 18–19, *infra*):

> Whoever shall falsely make, alter, forge, or counterfeit, * * * any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States, or any of their officers or agents, any sum of money; * * * shall be fined not more than one thousand dollars and imprisoned not more than ten years.

This provision was taken, with but slight changes, from Section 5421 of the Revised Statutes, which in turn was derived from Section 1 of the Act of March 3, 1823, c. 38, 3 Stat. 771.

The indictment alleges that the petitioner did "falsely make, forge and alter a certain obligation of the United States, to wit: the endorsement on a draft for payment of money, *for the purpose of obtaining and receiving from the Treasurer of the United States, a sum of money,* * * *," (Italics ours.) It then sets forth both sides of the draft verbatim, and alleges that the petitioner forged the name of the payee of the draft, "with intent then and there and thereby to defraud, in violation of Title 18, United States Code, Sections 73 and 262; (Sections 29 and 148, U. S. C. C.)." (R. 5–7.)

There is a conflict of opinion as to whether Section 29 applies to the forging of the indorsement upon a check or other obligation of the United States, but the decided weight of authority is that the section does so apply. In *Hamil* v. *United States*, 298 Fed. 369, 372 (C. C. A. 5th), *supra*, the court said "we are of opinion that that section does not relate to the forgery of obligations or securities of the United States." And in *United States* v. *Wilson*, Fed. Cas. No. 16,732 (D. Minn.), it was held that the forging of an indorsement upon a genuine check was not covered by the words "or other writing" in the Act of March 3, 1823, *supra*. On the other hand it was decided in *United States* v. *Winters*, 5 F. (2d) 321, 322 (W. D. Wash.), that the forgery of an indorsement of the payee on the back of a Veterans Bureau check was a forgery of an "order" within Section 29. The same view was expressed with reference to Section 5421 R. S. in *United States* v. *Albert*, 45 Fed. 552, 556 (N. D. Fla.). In *De Lemos* v. *United States*, 91 Fed. 497, 499 (C. C. A. 5th), *supra*, the court said that Section 5421 R. S. covered the forging of an indorsement on a valid check, and in *Gesell* v. *United States*, 1 F. (2d) 283, 287–288 (C. C. A. 8th), *supra*, the same conclusion was reached with respect to Section 29 of the Criminal Code. In other cases it has been assumed, apparently as a matter of course, that Section 29 covered the forging of an indorsement upon a check or other obligation

of the United States. *White* v. *Levine*, 40 F. (2d) 502 (C. C. A. 10th), *supra*; *Bailey* v. *United States*, 13 F. (2d) 325 (C. C. A. 9th); *Lewis* v. *United States*, 8 F. (2d) 849 (C. C. A. 8th), *supra*; *Neall* v. *United States*, 118 Fed. 699, 706 (C. C. A. 9th).

We submit that the forging of an indorsement upon a Government check for the purpose of obtaining money from the United States, or officers of the United States, comes within the language of Section 29, which refers to "any deed, power of attorney, order, certificate, receipt, contract, *or other writing.*" This language has been characterized by this Court as "comprehensive" and "all-embracing." *United States* v. *Davis*, 231 U. S. 183, 188. It was early pointed out under a very similar statute,[1] that nothing in its language or in the evils intended to be remedied by the statute indicated that the words "or other writing" were used in a restricted sense. "Various writings are mentioned, but these writings have no common object, nor any characteristic features common to all from which to infer an intention to restrict the effect of the provision to any particular class of writings." *United States* v. *Lawrence*, 13 Blatch. 211 (C. C., S. D. N. Y.). In *Howgate* v. *United States*,

[1] The Act of April 5, 1866, c. 24, 14 Stat. 12, which later became Section 5418 of the Revised Statutes, provided a penalty for the forging of "any bond, bid, proposal, guarantee, security, official bond, public record, affidavit, or other writing for the purpose of defrauding the United States."

7 App. D. C. 217, the court said with respect to the words above quoted from Section 29 (p. 233):

> * * * We are not to assume that, because certain classes of writings are specified, we are to regard as surplusage and attach no meaning to the expression "other writings." * * * The language of the statute is broad enough to include all writings whatever of every kind and character, by which the United States could be defrauded; and there would seem to be neither reason nor propriety in giving it any restricted meaning that would destroy its efficacy, when its plain purpose is to prevent fraud upon the United States by the falsification of papers.

In the trial court the petitioner contended that the indictment did not state an offense under Section 29 because it did not allege that the indorsement was forged "with intent to defraud the United States." (R. 52.) Support for this argument is found in *White* v. *Levine*, 40 F. (2d) 502, 503 (C. C. A. 10th), *supra*, wherein it is stated, without discussion, that in an indictment under Section 29 it is necessary to allege that the forgery was done with "intent to defraud the United States." We submit (1) that such an allegation was not necessary in the indictment in the instant case, and (2) that the indictment in substance makes it.

It should be noted that Section 29 (pp. 18–19, *infra*) is divided into three parts. The first part refers to the making of any forged or counterfeit

writing "for the purpose of obtaining or receiving * * * from the United States, or any of their officers or agents, any sum of money." The second part refers to the uttering of any such forged or counterfeit writing "with intent to defraud the United States." The third part refers to the transmitting or presenting to any office or officer of the United States of any writing, in support of any claim, "with intent to defraud the United States." Although an intent to defraud the United States is required by the second and third parts of section 29, the first part of the section, and the one upon which the present indictment is based, requires only an intent that the forgery be for the purpose of obtaining or receiving money from the United States or an officer thereof.

In *United States* v. *Barney,* Fed. Cas. No. 14, 524 (C. C., S. D. N. Y.), the court said with respect to Section 1 of the Act of March 3, 1823, *supra:*

> The first branch does not count in express words upon a guilty knowledge, or an intent to defraud the United States, in the forger, for the very obvious reason, that the fabrication of the instrument for the purpose of obtaining money of the United States necessarily implies both. No person could do the act prohibited without both a guilty knowledge and an intent to defraud the government. * * * The terms "for the purpose of obtaining or receiving * * * any sum or sums of money," are descriptive of the char-

acter of the instrument, as well as of the intent of the fabricator.

In *Staton* v. *United States*, 88 Fed. 253, 255 (C. C. A. 8th), the same view was expressed. Numerous cases which have involved Section 29 of the Criminal Code likewise indicate that an indictment under the first part of that section need allege only that the forgery was committed with intent to obtain or receive a sum of money from the United States, or an officer thereof. *Bailey* v. *United States*, 13 F. (2d) 325, 326 (C. C. A. 9th), *supra*; *Lewis* v. *United States*, 8 F. (2d) 849, 850 (C. C. A. 8th), *supra*; *Gesell* v. *United States*, 1 F. (2d) 283, 287 (C. C. A. 8th), *supra*; *United States* v. *Fout*, 123 Fed. 625, 626, 628 (E. D. Mo.).

Moreover, assuming that an indictment under the first part of Section 29 should allege an intent to defraud the United States, we submit that the indictment in the instant case substantially met this requirement.[2] The indictment alleges that the petitioner forged the endorsement on the check in question "for the purpose of obtaining and receiving from the Treasurer of the United States, a sum of

[2] The charge of the trial court to the jury was clearly broad enough to cover the offense created by the first part of Section 29 of the Criminal Code. The court repeatedly advised the jury that the issue of fact which they had to decide was whether the petitioner intentionally endorsed the payee's name on the check "with the intent to defraud the government." (R. 90, 91.) The word "government" could only refer to the United States.

money." (R. 5.) It further alleges an intent "to defraud, in violation of Title 18, United States Code, Sections 73 and 262; (Sections 29 and 148 U. S. C. C.)." (R. 6–7.)

CONCLUSION

We respectfully submit that the judgment of the court below should be affirmed.

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JANUARY, 1931.

APPENDIX

STATUTES INVOLVED

Section 147 of the Criminal Code (U. S. C., Title 18, Sec. 261), provides in part as follows:

> The words "obligation or other security of the United States" shall be held to mean all * * * checks, or drafts for money, drawn by or upon authorized officers of the United States * * *.

Section 148 of the Criminal Code (U. S. C., Title 18, Sec. 262), provides:

> Whoever, with intent to defraud, shall falsely make, forge, counterfeit, or alter any obligation or other security of the United States shall be fined not more than $5,000 and imprisoned not more than fifteen years.

Section 29 of the Criminal Code (U. S. C., Title 18, Sec. 73), provides as follows:

> Whoever shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly aid or assist in the false making, altering, forging, or counterfeiting, any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States, or any of their officers or agents, any sum of money; or whoever shall utter or publish as true, or cause to be uttered

or published as true, any such false, forged, altered, or counterfeited deed, power of attorney, order, certificate, receipt, contract, or other writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; or whoever shall transmit to, or present at, or cause or procure to be transmitted to, or presented at, any office or officer of the Government of the United States, any deed, power of attorney, order, certificate, receipt, contract, or other writing, in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited, shall be fined not more than one thousand dollars and imprisoned not more than ten years.

U. S. GOVERNMENT PRINTING OFFICE: 1931

SUPREME COURT OF THE UNITED STATES.

No. 448.—October Term, 1930.

Aaron Prussian, Petitioner, *vs.* The United States. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 24, 1931.]

Mr. Justice Stone delivered the opinion of the Court.

Prussian, the petitioner, was convicted in the District Court for Eastern New York of forging an endorsement purporting to be that of a payee of a government draft. At the trial, by motions to dismiss and in arrest of judgment, the sufficiency of the indictment was challenged on the ground that the offense charged was the forging of an obligation of the United States in violation of § 148 of the Criminal Code, U. S. C., Title 18, § 262, and that the endorsement alleged to have been forged was not such an obligation. The Court of Appeals for the Second Circuit affirmed the judgment, holding that the indictment sufficiently charged a violation of that section. 42 F. (2d) 854.

Certiorari was asked on the ground, among others, that the decision below conflicted with decisions of the Court of Appeals for the Eighth Circuit, *Gesell* v. *United States*, 1 F. (2d) 283; *Lewis* v. *United States*, 8 F. (2d) 849. See also *White* v. *Levine*, 40 F. (2d) 502. In accord with the decision below are *Hamil* v. *United States*, 298 Fed. 369, and *Alvarado* v. *United States*, 9 F. (2d) 385; cf. *United States* v. *Jolly*, 37 Fed. 108; *DeLemos* v. *United States*, 91 Fed. 497. Because of the conflict the petition was not opposed by the government, although it suggested that the indictment might also be upheld as charging a forgery of a "writing, for the purpose of obtaining . . . from the United States . . . any sum of money" under Section 29 of the Criminal Code, U. S. C., Title 18, § 73. This Court granted the petition, 282 U. S. —, October 20, 1930, limiting review to the question whether the indictment stated an offense under the Criminal Code.

The indictment charged the forging by petitioner of "a certain obligation of the United States", described as the endorsement on a draft, drawn by a disbursing clerk of the United States Treasury

upon the Treasurer of the United States and issued to the payee, "by falsely making and forging the name of the payee . . . on the back of said draft". It set out a copy of the draft and the endorsement, and alleged that together they constituted a forged obligation of the United States. The indictment also set up that the endorsement was "for the purpose of obtaining and receiving from the Treasurer of the United States a sum of money", and was stated to be in violation of both §§ 29 and 148 of the Criminal Code.

Under § 148, "whoever, with intent to defraud, shall falsely make, forge, counterfeit, or alter any obligation or other security of the United States" is guilty of a criminal offense. Section 147 provides: "The words 'obligation or other security of the United States' shall be held to mean all . . . checks, or drafts for money, drawn by or upon authorized officers of the United States". It is apparent that the draft drawn on the Treasurer by an authorized officer is an "obligation . . . of the United States" both in common parlance and by the express definition of § 147. But to extend the meaning of that phrase so as to embrace the endorsement on the government draft is to enlarge the statutory definition, and would be possible only by a strained construction of the language of §§ 147 and 148, inadmissible in the interpretation of criminal statutes, which must be strictly construed. See *Fasulo* v. *United States*, 272 U. S. 620; *United States* v. *Salen*, 235 U. S. 237.

The writing described in the indictment, when issued by the drawer, was a check or a draft. The added endorsement was in itself neither a check nor a draft. We need not stop to consider the argument advanced that the obligation upon the draft does not become complete until it is endorsed, see *Hamil* v. *United States*, *supra*, p. 371, for it overlooks the circumstance that the meaning of "obligation" in § 148 is narrowed by the definition in § 147 to specifically enumerated written instruments, including checks or drafts for money, which are complete, as such, within the statutory definition and in common understanding, at least when issued to the payee by an authorized officer of the government. The endorsement was at most the purported obligation of the endorser, not of the United States, and a purported transfer of the title of the draft to the endorsee. In neither aspect was the endorsement itself an obligation of the United States as defined by § 147, or such a part of the draft as to constitute the forging of the endorsement a forgery of the draft.

If the point were doubtful, the doubt would be resolved by a consideration of the purpose and history of the Act of which § 148 is a part, and a comparison of it with related provisions of the Criminal Code. Its purpose has been declared by this Court to be the protection of the bonds or currency of the United States, and not the punishment of any fraud or wrong on individuals. *Dunbar* v. *United States*, 156 U. S. 185, 193; cf. *United States* v. *Turner*, 7 Pet. 132, 136; *United States* v. *Stewart*, 4 Wash. C. C. 226. Section 148 is a reenactment of § 18 of the Act of April 10, 1816, 3 Stat. 266, 275, which made punishable the forgery of bills, notes, orders or checks of the Bank of the United States. The legislation took substantially its present form in the Act of June 30, 1864 (c. 172, 13 Stat. 218, 221, 222), § 10 of which (later R. S. § 5414) extended its penal provisions to the forgery of "any obligation or security of the United States", and § 13 of which (later R. S. § 5413) defined obligations of the United States substantially as in the present § 147. Before the enactment of the 1864 prototype of § 148, the purpose of the 1816 act had been declared, in *United States* v. *Turner*, *supra*, to be "to guard the public from false and counterfeit paper, purporting on its face to be issued by the bank"; and it had been held to be inapplicable to a forged endorsement upon a genuine post note of the Bank. *United States* v. *Stewart*, *supra*. In the light of this history, the omission of any reference to endorsements in § 148 is not without significance; and it is worthy of note that Congress later enacted laws specifically punishing forgery of endorsements on pension checks and money orders. Title 38, U. S. C., § 128; Title 18, U. S. C., § 347.

But we think the indictment is to be sustained as charging an offense under § 29 of the Criminal Code, which punishes the forgery of "any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving . . . from the United States, or any of their officers or agents, any sum of money". The indictment alleges specifically and with certainty the forgery of the endorsement on the draft, for the purpose of obtaining a sum of money from the Treasurer of the United States, and charges a violation of § 29. We think the endorsement was a "writing" within that section. Its language is "comprehensive" and "all-embracing". Cf. *United States* v. *Davis*, 231 U. S. 183, 188. The writings enumerated have no common charac-

teristic from which a purpose may be inferred to restrict the statute to any particular class of writings. The addition of "other writing" to the enumeration was therefore not for the purpose of including writings of a limited class, but rather of extending the penal provisions of the statute to all writings of every class if forged for the purpose of obtaining money from an officer of the United States. See *Howgate* v. *United States*, 7 App. D. C. 217, 232, 233; cf. *United States* v. *Lawrence*, 13 Blatch. 211. It has been generally assumed by the lower federal courts that § 29 covers the forging of an endorsement. *United States* v. *Winters*, 5 F. (2d) 321; *Gesell* v. *United States*, *supra*, pp. 287, 288; *White* v. *Levine*, *supra*; *Bailey* v. *United States*, 13 F. (2d) 325; *Lewis* v. *United States*, *supra*; cf. *United States* v. *Albert*, 45 Fed. 552; *DeLemos* v. *United States*, *supra*. But see, contra, *Hamil* v. *United States*, *supra*, p. 372; cf. *United States* v. *Wilson*, Fed. Cas. No. 16,732.

Petitioner asserts that the indictment is defective in that it does not charge that the forgery was with intent to defraud the United States. See *White* v. *Levine*, *supra*, p. 503. No such averment is required by the language of § 29 relating to forged endorsements. Other provisions of § 29 punish the uttering of a forged writing, or presenting any such writing to an officer of the United States in support of any claim, "with intent to defraud the United States". But the present indictment is not under either of those provisions. The charge is forgery of the endorsement, which is punishable by the different provision, now in question, if committed merely "for the purpose of obtaining or receiving" from an officer or agent of the United States any sum of money. This imports an intent to defraud the United States, which the indictment sufficiently charges in the language of the statute.

Nor is the present indictment defective, as is urged, because its material allegations are uncertain or repugnant. The accused was left in no uncertainty that he was charged with only a single act, that of forging the endorsement for the specified purpose. The judgment here would constitute an unmistakable bar to any future prosecution for the same offense. The validity of the indictment is therefore not affected by the fact that the pleader, through excess of caution, has mistakenly stated the act to be a violation of both § 148 and § 29. See *Williams* v. *United States*, 168 U. S. 382.

Affirmed.